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No. _____

In The

Supreme Court of the United States

October Term, 1996

JANE PHILLIPS EPISCOPAL MEMORIAL MEDICAL CENTER, JANE PHILLIPS EPISCOPAL HOSPITAL, INC., f/k/a Jane G. Phillips Memorial Hospital, Inc. d/b/a Oklahoma Medical Collection Services, and CHARLES WELLSHEAR, M.D.,

Petitioners,

v.

MAX LEE RISHELL, Curator of the Person and Estate of KATHLEEN LACEY, an incapacitated person,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER A GUARDIAN CAN UNILATERALLY CHANGE THE DOMICILE OF AN INCOMPETENT PERSON WHO LACKS THE UNDERSTANDING AND MENTAL CAPACITY TO MAKE AN INTELLIGENT CHOICE?

II. WHETHER ABSENT FAMILY MEMBERS OF AN INJURED PARTY, WHOSE RIGHTS ARE SOLELY DERIVATIVE FROM THE INJURED PARTY, CONSTITUTE INDISPENSABLE PARTIES UNDER FED. R. CIV. P. 19, WHERE THE FAMILY MEMBERS MAY BE COLLATERALLY ESTOPPED FROM ASSERTING THEIR RIGHTS IN THE EVENT THAT THEY ARE NOT JOINED?

III. WHETHER THE WILLINGNESS OF FAMILY MEMBERS TO RISK ESTOPPEL IN FEDERAL COURT, WHILE CONCURRENTLY PROSECUTING A PARALLEL STATE COURT PROCEEDING, IS SUFFICIENT TO TRANSFORM THEM INTO "DISPENSABLE" PARTIES?

IV. WHETHER THE INTERESTS OF ABSENT FAMILY MEMBERS WHO MAY BE BOUND BY COLLATERAL ESTOPPEL CAN BE ADEQUATELY PROTECTED BY A GUARDIAN WHO REPRESENTS ONLY THE INJURED PARTY?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose ruling is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed. Marriott Corporation, a fiduciary of an ERISA plan, seeks intervention in pending cases in both state and federal court, but is not involved in issues pertinent to this Petition, and did not appeal from the district court's ruling below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Jane Phillips Episcopal Memorial Medical Center ("Hospital") and Dr. Charles Wellshear respectfully petition for a writ of certiorari to review the opinions of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 94 F.3d 1407 (10th Cir. 1996) and is reproduced in the Appendix filed herewith ("App.") at 1. The unreported opinions of the district court from the Northern District of Oklahoma in this case are reproduced at App. 13 and App. 26. This case has been the subject of a previous Tenth Circuit opinion, reported at 12 F.3d 171 (10th Cir. 1993) which is also attached at App. 35. The district court's order from which Plaintiff appealed from the Western District of Oklahoma appears at App. 44.

STATEMENT OF JURISDICTION

The Court of Appeals filed its opinion on August 26, 1996. Petitioners sought a Petition for Rehearing with the Court of Appeals with a Suggestion for Rehearing En Banc which was denied October 31, 1996. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1) (1993).

STATUTES INVOLVED

28 U.S.C. § 1332(a)(1) and (c)(2) provide in pertinent part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy . . . is between (1) citizens of different States. . . .
>
> (c)(2) the legal representative of . . . an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

28 U.S.C. § 1332(a)(1) and (c)(2) (1993).

Rule 19 of the Federal Rules of Civil Procedure ("Rule 19") is set forth below.

> Rule 19. Joinder of Persons needed for Just Adjudication
>
> (a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if . . . (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. . . .
>
> (b) Determination by Court Whenever Joinder Not Feasible. If a person described in subdivision (a)(1)-(2) hereof cannot be made a party, the

> court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

FED. R. CIV. P. 19(a)(2) and (b).

STATEMENT OF THE CASE

This case has a lengthy and complex procedural history, and has been the subject of two Tenth Circuit opinions regarding pretrial jurisdictional matters. Jurisdiction of the court of first instance was alleged to be predicated upon diversity of citizenship.

On February 6, 1992, Max Rishell, Plaintiff/Appellant/Respondent ("Rishell" or Plaintiff), filed suit in the United States District Court for the Western District of Oklahoma as curator of Kathleen Lacey, an incapacitated person. Mr. Rishell filed a medical negligence action against the Hospital, seeking damages for neurological injury incurred by Kathleen Lacey pursuant to her unsuccessful suicide attempt at the Hospital on November 21,

1990. On November 20, 1990, Mrs. Lacey was admitted to the Hospital in Bartlesville, Oklahoma, by Dr. Charles Wellshear for treatment of depression.

All of the immediate Lacey family members resided in Washington County in Bartlesville at the time of the incident, as did the Hospital, its principal officers, and Dr. Wellshear.[1] After the incident, Mrs. Lacey was moved to a long-term care facility in Slidell, Louisiana. Her brother-in-law, Max Rishell, a Missouri resident, initiated an ex parte interdiction proceeding there, and asked that a Louisiana probate court name him curator over Mrs. Lacey.[2] The Louisiana court granted that request and also named Mrs. Lacey's husband, Ralph Lacey, as under-curator.

While Rishell was prosecuting the federal action, the same attorneys filed a parallel state court case on November 18, 1992, raising the same causes of action against the same two Defendants. The only material difference between the state and federal proceedings is that the state case includes Ralph Lacey and the three Lacey children as plaintiffs. Mr. Lacey and the children seek damages relating to spousal and parental consortium. The state case was initially filed in Tulsa County, based on alleged business contacts between the Hospital and Tulsa vendors. The Tulsa court found venue improper, and transferred

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[1] Throughout the protracted procedural history of this case, Plaintiffs have resisted filing this suit, or transferring this case, to the one forum in which jurisdiction is unquestionably proper: in state court in Washington County, Oklahoma.

[2] A curator is the equivalent of a guardian under Louisiana law.

the case to Rogers County. Plaintiffs alleged that venue was proper there based solely on the chance service of Dr. Wellshear in Rogers County. Defendants filed a Motion to Dismiss for Improper Venue. The court granted the motion, which ruling was reversed on appeal, and is now subject to further appellate review in state court.[3]

In the federal court case, the Western District judge dismissed the case for lack of diversity jurisdiction because Mrs. Lacey and all family members were residents of Oklahoma, as was the Hospital. On appeal, however, the Tenth Circuit reversed and remanded for further consideration of the domiciliary issue, holding that Mrs. Lacey, an incompetent, was capable of having her domicile changed from Oklahoma to Louisiana by her curator, Mr. Rishell, if he were acting in her best interest. As stated below, that opinion has been rejected by another circuit. Petitioners seek review of that decision.

On remand, Rishell amended the Complaint on April 5, 1994, to include Dr. Charles Wellshear as a defendant. Plaintiff alleged that venue was proper in the Western

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[3] Another federal court action was initiated by Ralph Lacey individually and on behalf of Kathleen Lacey in the United States District Court for the Western District of Oklahoma, where the Laceys sought payment from various insurers and an ERISA plan for Mrs. Lacey's medical bills. The insurance companies and the ERISA plan attempted to bring in the Hospital and Dr. Wellshear as third parties, and Mr. Lacey filed "cross claims" against the third-party defendants as well. The case was assigned to Judge David Russell who dismissed the third party complaints for failure to state a claim. The court also dismissed the "cross claims." No appeals were taken from those rulings by the plaintiffs or the defendant insurers.

District by virtue of the fact that the Episcopal Diocese was situated in the Western District, and that the Episcopal diocese "ran" the Hospital. Both Defendants filed Motions to Dismiss for Improper Venue. After allowing limited discovery, the court found venue improper and transferred the case to the Northern District of Oklahoma. Bartlesville, Oklahoma, where the Hospital is located and the incident took place, falls within the jurisdiction of the United States District Court for the Northern District of Oklahoma.

In the Northern District, Defendants filed Motions to Dismiss for Failure to Join Indispensable Parties, the spouse and children of Mrs. Lacey. That court granted the Motions, and issued an order that engaged in a detailed Rule 19 analysis, concluding that the non-diverse spouse and children were necessary parties, and that the lawsuit should not proceed in their absence. Since the absent parties were indispensable and their addition would defeat diversity, the case was dismissed. The Northern District judge found the reasoning of a Ninth Circuit case and a predecessor district court opinion helpful in his analysis. Those federal courts held that in personal injury actions which involve an injured child, and in which the non-diverse absent family members are concurrently prosecuting a parallel state court proceeding, the missing family members are indeed necessary and, if they cannot be joined, the case must be dismissed.

Plaintiff appealed the district court's dismissal, and the Tenth Circuit reversed and remanded the case to the Northern District, on the basis that the trial court had abused its discretion in finding that the parties were indispensable. Defendants sought review of that decision

on Petition for Rehearing and a suggestion for Rehearing En Banc, which was denied. Petitioners also seek review of this Tenth Circuit decision regarding indispensability. The case is now set for trial in the Northern District of Oklahoma for May 19th through 28th, 1997.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Tenth Circuit has issued, and published, two opinions in this case which threaten to both confuse and expand diversity jurisdiction. This Court should grant the writ to reverse those rulings, thereby resolving a split among the circuits on questions of subject matter jurisdiction while clarifying and simplifying jurisdictional determinations.

In its first ruling, (*Rishell-I*) the Tenth Circuit held that the guardian of a permanently incapacitated person was capable of changing his ward's domicile by moving her to another state, even though she is irreversibly incapacitated and therefore incapable of forming intent. That ruling has been criticized by the Fourth Circuit in a recent opinion, in which that circuit elected to abide by its rule that an incompetent may change his domicile, if and only if, he acquires sufficient understanding and mental capacity to make an intelligent choice. *Long v. Sasser*, 91 F.3d 645, 647 (4th Cir. 1996).[4] Moreover, the Tenth Circuit's

[4] *Long v. Sasser* was not included in the argument on jurisdiction in the appellate briefs to the Tenth Circuit, as that case was not decided until August 2, 1996, and Defendants'/Appellees' response brief on appeal was filed June 26, 1995.

ruling conflicts with its own well-settled law in *Coppedge v. Clinton*, 72 F.2d 531, 533 (10th Cir. 1934), in which the court unequivocally held that an incompetent person presumptively lacks the capacity to change domicile.

These novel pronouncements of law encourage jurisdictional uncertainty and additional litigation. As pointed out by the Fourth Circuit, the Tenth Circuit's holding in *Rishell-I*, that the domicile of an incompetent person is determined by the guardian "if the best evidence available shows the incompetent will likely never be restored to reason" and if the guardian is acting "in the best interests of the ward," invites incidental litigation over these two subjective determinations. *Long*, 91 F.3d at 647.

Secondly, this Court should grant the writ to resolve a split between federal circuit courts of appeals on the question of whether a spouse and children of an incapacitated person are indispensable party plaintiffs in a personal injury case where the spouse and children are concurrently prosecuting an identical state court suit. The Ninth and Tenth Circuits reached contrary conclusions on remarkably similar facts in the following cases: *Aguilar v. Los Angeles County*, 751 F.2d 1089 (9th Cir. 1985), *cert. denied*, 471 U.S. 1125 (1985); *Lopez v. Martin Luther King, Jr. Hosp.*, 97 F.R.D. 24 (D.C. Cal. 1983) and this case, *Rishell v. Jane Phillips Memorial Medical Center*, 94 F.3d 1407 (10th Cir. 1996) (*Rishell-II*).

This conflict among the circuits regarding whether absent family members should be included as party plaintiffs breeds contradictory decisions and assures repetitive lawsuits. Moreover, the resultant uncertainty encourages absent family members to file simultaneous

litigation in both state and federal court, further burdening both overtaxed court systems. Not only repetitive suits but multiple suits may result, as the Tenth Circuit's opinion in *Rishell-II* also suggests that each child and the spouse could maintain separate actions in state court, as any one action would not necessitate the joinder of the other. Thus the duplicative effect may be multiplied by the number of potential plaintiffs.

Prior to *Rishell-II*, the cases that discussed indispensable parties in a familial relationship held that the determinate is whether the child's Rule 19 "interest" is so intertwined with the parents' interests that a decision in one court binds the other by virtue of collateral estoppel. If that interdependent relationship exists, the absent parties' interests are adversely affected; thus the missing parties are necessary. *Aguilar*, 751 F.2d 1089; *Lopez*, 97 F.R.D. 24. These courts deem the parent-child relationship significant enough to invoke the interest requirement under Rule 19(a). Further, these cases demonstrate that because of the pending parallel state action, the potential for collateral estoppel affects the absent plaintiffs to the point that the suit should not proceed in their absence.

Other opinions that discuss the indispensability of parties view as the linchpin whether the missing party has another available forum in which to seek redress. If so, then the plaintiffs could proceed to the other forum, particularly when all parties are present, and prosecute their action there, thus ensuring plaintiffs' ability to protect their interests. *See, e.g., Anrig v. Ringsby United*, 603 F.2d 1319, 1326 (9th Cir. 1979); *Gottlieb v. Vaicek*, 69 F.R.D. 672 (N.D. Ill. 1975), *aff'd*, 544 F.2d 523 (7th Cir. 1976); *Potomac Electric Power Co. v. Babcock & Wilcox Co.*, 54

F.R.D. 486 (D.Md. 1972); and *Levin v. Mississippi River Corp.*, 289 F.Supp 353 (S.D.N.Y. 1968).

In spite of these decisions by other circuits, the Tenth Circuit found that the husband and children in this case are not interested parties to the federal suit, and even if they are, any danger to the absent family members' interests is ameliorated by the presence of the curator, notwithstanding that the curator represents only the interests of the incompetent. Only the Tenth Circuit (and a dissenting judge in one other jurisdiction) believe the absent family members to be uninterested and adequately represented by the curator/representative. *See Risheli-II* and the dissent in *Aguilar*, 751 F.2d 1089, 1094 (Ferguson, J., dissenting).

In reaching its conclusions, the Tenth Circuit gave only perfunctory consideration to the Rule 19 criteria set forth in *Provident Bank & Trust Co. v. Patterson*, 390 U.S. 102, 106-107, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968), the leading case from this Court regarding the determination of indispensable and necessary parties. The Tenth Circuit's failure to apply these factors to the facts of this case was compounded by the substitution of its own discretion for that of the trial court.

Lastly, the Tenth Circuit determined in *Rishell-II* that while indispensability can be waived in a lawsuit, such a waiver was needless in this case where the interested parties are adequately represented by the curator. The Tenth Circuit concluded so, even though here, the curator only represents the interests of Mrs. Lacey, and not the other family members. Moreover, Mr. Lacey's purported waiver of his interests in the federal litigation does not

extend to the pending state litigation. However, he does attempt to waive others' rights in the federal case, those of his children, even though they are legally competent to make this determination for themselves.

The Tenth Circuit's decision contravenes the Seventh Circuit's holding that a party's attempted waiver of his indispensability is ineffective. Moreover, if indispensable parties can opt to waive their own and others' indispensability, then the rule requiring their presence is effectively abrogated.

In summary, the decisions of the Tenth Circuit in this case are contrary to the decisions of other circuits and its own precedent. The opinion in *Rishell-II* also disregards this Court's opinion in *Provident Bank*. These published rulings decided questions regarding jurisdiction which have not been, but should be settled by this Court. The questions are: whether an incompetent's domicile can be changed by relocating the ward to another state; whether family members who are absent in a federal personal injury case, but who are concurrently prosecuting an identical state court action, are necessary and indispensable parties; whether the indispensability of absent parties can effectively be waived; and whether a guardian who represents only the interests of his ward also adequately protects the interests of the missing plaintiffs.

I. AS A RESULT OF THE TENTH CIRCUIT'S OPINION, THRERE IS NOW A SPLIT AMONG FEDERAL CIRCUITS AS TO WHETHER AN INCOMPETENT CAN CHANGE HER DOMICILE DESPITE DEMONSTRABLE LACK OF INTENT

Whether the district court has subject matter jurisdiction in this action, which is presently set for trial, is the threshold question. Initially, when this case was pending in the Western District, Judge Cauthron ruled that subject matter jurisdiction did not lie in any federal court in Oklahoma. The Tenth Circuit reversed, and remanded for fact-finding and an evidentiary determination as to whether the relocation of Mrs. Lacey to Louisiana was a ploy, or was "in her best interests." *Rishell v. Jane Phillips Memorial Medical Center*, 12 F.3d 171, 174 (10th Cir. 1993) (*Rishell-I*) (App. 42). The lower court, after observing that there were strong arguments in favor and against, concluded that the relocation of Mrs. Lacey to Louisiana was in her best interests.[5]

As noted in *Long v. Sasser*, allowing a guardian to change the domicile of the ward if it is in the ward's best interest invites a speculative inquiry as to whether the ward will remain incompetent in the future and spawns additional litigation as to what is in the ward's best interest. *Long*, 91 F.3d at 647, referring to *Rishell-I* at 174. ("Most critical to the paradigm we have posed is the best interest of [the incompetent ward]"). As *Long* states, in disagreement with *Rishell-I*, the Tenth Circuit has displaced formerly clear jurisdictional rules attending the

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[5] No member of the Lacey/Rishell family resides in Louisiana, and the limited custodial care provided by the New Medico facility is hardly unique to that state.

ever-growing number of cases involving persons who can be kept "alive" indefinitely by artificial means and invites a "singularly unproductive" inquiry into whether the " 'best interests' of a ward are served by a guardian's attempt to effect a change in domicile to secure a federal forum." *Long*, 91 F.3d at 647-648.

In its first opinion the Tenth Circuit eroded the former bright line rule of *Coppedge v. Clinton*, 72 F.2d 531 (10th Cir. 1934). As *Rishell-I* acknowledged, the "unequivocal" rule of *Coppedge* – that "an incompetent person presumptively lacks the capacity to change domicile" – "is a principle so well grounded in federal common law that it may be regarded as an aphorism." *Rishell-I*, 12 F.3d 171 at 173. That rule is clear and easily applied, as rules determining subject matter jurisdiction should be. The decision of whether a federal court has jurisdiction must be made simply and early, so that the court's resources are not wasted by later entertaining proceedings as to the jurisdictional question in order to avoid a potentially reversible judgment. As stated by the Fourth Circuit, "[j]urisdictional rules should above all be clear. They are meant to guide parties to their proper forums with a minimum of fuss." *Long*, 91 F.3d at 647. As this Court observed more than 45 years ago:

> [P]rompt, economical and sound administration of justice depends to a large degree upon definite and finally accepted principles governing important areas of litigation, such as the respective jurisdictions of federal and state courts[.]

American Fire & Casualty v. Finn, 341 U.S. 6, 8, 71 S.Ct. 534, 95 L.Ed 702 (1951).

The *Coppedge* rule is also in keeping with the intent of revised § 1332 of Title 28 of the United States Code, that provides:

> (c)(2) The legal representative of the estate of a decedent shall be deemed to be a citizen only of the same state as the decedent, and the legal representative of an infant or an incompetent shall be deemed to be a citizen only of the same state as the infant or the incompetent.

28 U.S.C. § 1332(c)(2).

The Comment on this 1988 revision, reported in the United States Code at § 1332, states:

> The traditional notion was that the citizenship that would count would be the citizenship of the personal representative – the executor, executrix, administrator, administratrix, etc. – but this was found to leave too much power on the decedent's[6] side to arrange things to suit its own choice-of-forum preferences. The law in many states often allows its probate or equivalent court to appoint as personal representative almost anyone the family and other potential beneficiaries want, a fact tailor-made for the manufacture – or, indeed, the undermining – of diversity by the decedent's side.
>
> The family, well orchestrated by a thoughtful lawyer, would just march to probate court[7] with

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[6] The Comment's remarks concerning decedents applies equally to wards and incompetents.

[7] The lower court in the Western District was explicitly unimpressed with the Louisiana interdiction order; the lower court in the Northern District apparently did not give it weight.

> all parties interested in the estate agreeing to the appointment of one X to be the representative. X might have no interest whatever in the estate, either as named beneficiary or as intestate distributee, nor any relationship at all to any interested person, and yet X's citizenship would be deemed the diversity measure on the decedent's side. This would serve the family well in any lawsuit contemplated by the estate. . . .

28 U.S.C.A § 1332, Comment: *In Estate and Ward Cases, Representative will Henceforth Have Represented Person's Domicile.*

The Comment concludes that Congress adopted the revision to § 1332, predicated upon the American Law Institute's proposal, to satisfy the mandate of 28 U.S.C. § 1359 (1993). That section provides: "A district court shall not have jurisdiction of a civil action in which any party . . . has been improperly or collusively made or joined to invoke the jurisdiction of such court," and under it, the cases were legion concerning representatives and guardians. The amendment to § 1332 was designed to remove that litigious issue and replace it with a simple rule. The Tenth Circuit's opinion in *Rishell-I* is antithetical to that purpose.

Despite the common sense of the *Coppedge* rule, facilitating a "bright-line" jurisdictional decision, and despite Congress' intent to put an end to the forum shopping that

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It is difficult to tell from the face of *Rishell-I* to what extent that order was persuasive to the Tenth Circuit. The Petitioner doctor was not a party to the case at the time of the first appeal; accordingly, the Louisiana ex parte order does not even reference him.

dictated personal representative choices, and despite the reality that incompetents can be kept "alive" long after anyone with reason would want to be,[8] the Tenth Circuit – alone among the circuits – decided the *Coppedge* presumption is "not immutable." *Rishell-I*, 12 F.3d at 173. Thus, the Tenth Circuit carved out an exception to that stout rule and held, as a pronouncement of new law, that the presumption that an incompetent retains her domicile can be rebutted. This decision is contrary to the holdings of every other circuit court of appeals which had ever been called upon to decide this question.[9]

The Tenth Circuit did not hold in *Rishell-I* that, as a matter of fact, the presumption had been or even could be rebutted in this case, but rather remanded that question for factual assessment. The trial court then entertained evidentiary proceedings, and in the face of contradictory evidence, assumed jurisdiction in spite of the fact that the

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[8] As Justice Anton Scalia said in his concurring opinion in *Cruzan v. Director Missouri Health Dept.*, 497 U.S. 261, 111 L.Ed.2d 224, 110 S.Ct. 2841 (1990): "The various opinions in this case portray quite clearly the difficult, indeed agonizing, questions that are presented by the constantly increasing power of science to keep the human body alive for longer than any reasonable person would want to inhabit it."

[9] Since *Rishell-I*, only one other court has cited that opinion for the concept that the *Coppedge* presumption is not immutable. However, *Juvelis by Juvelis v. Snider*, 68 F.3d 648 (3rd Cir. 1995), dealt with the "narrow question" of whether Pennsylvania's Department of Public Welfare residency requirement was discriminatory under the Rehabilitation Act. *Id.* at 653. The Court found an exception was appropriate in order to grant a retarded child state funds even though for the purpose of state funding he was not considered a resident. *Id.*

burden is on the party invoking federal court jurisdiction to establish it; that burden never shifts to movant. *State Farm v. Dyer*, 19 F.3d 514, 518 (10th Cir. 1994); *Penteco Corp. Ltd. v. Union Gas*, 929 F.2d 1519, 1521 (10th Cir. 1991); *Crowley v. Glaze*, 710 F.2d 676, 678 (10th Cir. 1983).

The district court made an evidentiary finding that, in the court's words, "the record is replete with pro and con arguments regarding the domiciliary issue." (App. 16). Where the question is close, the presumption should operate against federal court jurisdiction. However, instead of dismissing the action for want of jurisdiction, the court retained the case based on the subjective determination that Mrs. Lacey's best interests had been served. This analysis should never have been undertaken, and would not have been, had the Tenth Circuit abided by the previous rule of law that is in accord with its own decisions and those of other circuits.

II. AS A RESULT OF THE TENTH CIRCUIT'S DECISION, THE CIRCUITS HAVE SPLIT REGARDING WHETHER FAMILY MEMBERS ARE INDISPENSABLE PARTY PLAINTIFFS WHEN AN IDENTICAL STATE COURT SUIT IS PENDING

The Tenth Circuit, contrary to the Ninth Circuit's opinion on this issue, concluded that the spouse and children of an incompetent person, who have a virtually identical action pending in state court, are neither "necessary" nor "indispensable" parties to the federal court action. In order to reach that conclusion, the Tenth Circuit rejected the holdings and reasoning of the only cases in any jurisdiction that discuss whether family members are

indispensable parties in a personal injury action. These cases, which were understandably relied upon by the district court, are *Aguilar v. Los Angeles County*, 751 F.2d 1089 (9th Cir. 1985), *cert. denied*, 471 U.S. 1125 (1985) and *Lopez v. Martin Luther King Jr. Hosp.*, 97 F.R.D. 24 (D.C. Cal. 1983).

In *Aguilar*, the parents of a baby born in California filed a lawsuit against the hospital for injuries sustained by the child during birth. The parents, Mexican citizens, filed suit in federal court in California. The mother also filed suit on behalf of the child for post-majority and general damages for his injuries in California state court. After engaging in a Rule 19 analysis, the *Aguilar* court found that the child was indeed an indispensable party whose presence was required in the parents' action. Thus, the federal court dismissed the action because the addition of the child defeated the parents' diversity. *Aguilar*, 751 F.2d at 1094.

The facts in *Lopez* were almost identical to the *Aguilar* scenario. In *Lopez*, the parents of a brain-damaged baby filed suit against a California hospital. The parents were Mexican nationals whose citizenship created diversity among the parties, while the child, born in California, was a California resident. The mother, as the child's guardian ad litem, filed suit in Los Angeles Superior Court for injuries sustained by the child during childbirth. The mother sought to recover general damages and post-majority special damages on behalf of the child. The parents also filed suit in federal court in California, pursuant to a California statute that gives the parents of an injured minor child the right to recover pre-majority special damages for the child's injuries. The child was not a

party to the federal court proceeding. *Lopez*, 97 F.R.D. at 27-28.

The court rejected the plaintiffs' argument that because the child had an independent substantive right to recover damages, the child was not affected by the federal court litigation. Instead, the court found that a possibility existed that the child would be collaterally estopped from pursing her cause in California court if the federal court action resulted in a verdict for the defendants. Thus the child undoubtedly had an interest in the litigation, which would be impaired if the court proceeded in her absence. Pursuant to Rule 19(a)(2), the court decided that the missing plaintiff had an interest in the litigation. *Lopez*, 97 F.R.D. at 31.

In reaching its conclusion that the case should be dismissed, the *Lopez* court engaged in a painstaking analysis of each consideration in Rule 19(b). The court determined that: the availability of an adequate alternative forum militated heavily in favor of dismissal; the risk that the defendants would be subjected to multiple litigation was not only great but a reality; an adverse ruling to the parents in federal court might impair the child's probability of success in a future proceeding; and that there was an obvious interest in adjudicating all of the issues in one single forum. Thus, the court found the missing plaintiff indispensable, and dismissed the case. *Lopez*, 97 F.R.D. at 32-33.

The Tenth Circuit's holding in *Rishell-II* directly opposed the holding of the Ninth Circuit in *Aguilar* and the district court in *Lopez*. The opinion concluded that *Aguilar* and *Lopez* were not even worthy of analysis, even

though the issues presented by these cases were simply a transparency of those faced in *Rishell-II*. Instead, the Tenth Circuit disposed of *Aguilar* and *Lopez* in a cursory footnote which declared that the cases were "unpersuasive" and apparently even unworthy of dissection. The Tenth Circuit stated "to the extent that those cases are contrary to the authorities and analysis we have set out in the text on this issue, we do not find them persuasive. Indeed, the dissenting opinion in *Aguilar* is more convincing and in keeping with the weight of authority." *Rishell v. Jane Phillips Episcopal Memorial Medical Center*, 94 F.3d 1407, 1411 note 3 (10th Cir. 1996) (App. 8, note 3).

Interestingly, the dissent in *Aguilar* focused on the fact that pursuant to California statute, the parents possessed a separate and distinct cause of action from the child. The dissent thus found that the child's financial stake in the parents' outcome could not support the legally protected "interest" required to invoke Rule 19(a). *Aguilar*, 751 F.2d at 1095. However, the contrary is true in Oklahoma. As the Tenth Circuit notes, the rights of the spouse and the children are *derivative* from that of the injured party. Accordingly, the children and the spouse will be collaterally estopped from asserting their claims in any court if there is a defense verdict. Thus, there is no merit in the argument that the spouse and children in this case have no legal interest under the Rule 19(a) analysis.

Moreover, as noted by a West Virginia Supreme Court case interpreting a state statute similar to Rule 19, the dissent in *Aguilar* objects to a pragmatic reading of Rule 19, and prefers the analysis of an overruled trial court opinion in *Cortez v. County of Los Angeles*, 96 F.R.D. 427 (C.D. Cal. 1983), to the well-reasoned opinion of the

majority in *Aguilar* and *Lopez*. *Glover v. Narick*, 400 S.E.2d 816, 828 (W.Va. 1990) (Neely, C.J., dissenting). As noted by Chief Justice Neely, the ultimate logic of such decisions allows a myriad of separate lawsuits to arise from a single injury to one person because it presumes that no party, no matter the strength of the relationship or the interdependency of claims, is indispensable.

III. THE TENTH CIRCUIT'S DECISION IS CONTRARY TO THE ANALYSIS PROVIDED BY *PROVIDENT BANK*

In *Provident Bank & Trust Co. v. Patterson*, 390 U.S. 102, 106-107 (1968), the seminal U.S. Supreme Court case on Rule 19 analysis, this Court stated in a unanimous opinion that Rule 19(b) suggests four "interests" that must be examined in each case to determine whether, in equity and good conscience, the court should proceed without a party whose absence from the litigation is compelled. The four factors were characterized by Justice Harlan as (1) plaintiff's opportunity to proceed in an alternative forum; (2) defendant's desire to avoid multiple litigation or inconsistent judgment; (3) prejudice to the absentee; and (4) the interest of the courts and the public in complete, consistent and efficient settlement of controversies. *Id.* at 109-11.

Despite these clearly defined factors and analogous case law in other circuits, the Tenth Circuit failed to properly apply the Rule 19 factors to the facts of this case, thereby supplanting the discretion of the district court. Instead of undertaking a balanced analysis, the Tenth Circuit engaged in a singular discussion of the plaintiff's

right to choose his forum, and demonstrated little concern as to the rights of the defendants to be free from multiple lawsuits involving identical issues. Had the Court of Appeals applied the criteria of Rule 19 to the facts of the present case, it would not have reached the conclusion it did.

The Ninth Circuit's analysis of the Rule 19 factors in *Aguilar* and the district court's considerations in *Lopez* led to a different, and it is submitted, a more proper result than that reached by the Tenth Circuit. In this case, where there is already a state court case pending in which the family members are plaintiffs, an adequate alternative forum obviously exists. The first factor plainly weighs in favor of dismissal. According to some courts, that is the most important factor of the four. *See Anrig v. Ringsby United*, 603 F.2d 1319, 1326 (9th Cir. 1979); *Gottlieb v. Vaicek*, 69 F.R.D. 672 (N.D. Ill. 1975), *aff'd*, 544 F.2d 523 (7th Cir. 1976); *Potomac Electric Power Co. v. Babcock & Wilcox Co.*, 54 F.R.D. 486 (D.Md. 1972); and *Levin v. Mississippi River Corp.*, 289 F.Supp 353 (S.D.N.Y. 1968).

The second factor also weighs in favor of dismissal. The Defendants clearly wish to avoid the possibility of multiple litigation and inconsistent liability, yet multiple litigation is obviously more than a possibility, it is a certainty. The Defendants are currently defending two lawsuits in two different systems based on the same underlying issues of liability. If the federal action is dismissed, the state court system will be able to resolve all the family's claims in one comprehensive proceeding, thereby disposing of multiple suits and the potential for inconsistent liability.

The third criteria is whether as a practical matter the interests of these absent parties will be protected in the event that the federal suit proceeds without them. The Tenth Circuit's opinion ignored the fact that the absent family members have interests that are not represented in federal court, and focused instead only on the claims of Mrs. Lacey presented by Max Rishell. That the missing plaintiffs have distinct claims is demonstrated by the Petition filed in the state court suit. According to the state court Petition, Ralph Lacey seeks compensation for medical expenses, loss of services and loss of companionship. Likewise, the other missing plaintiffs maintain that they have suffered loss of services, earnings, contributions, companionship and grief. (App. 50-51). According to the Tenth Circuit's analysis, these interests of the absent parties will not be impaired, despite the fact that they may be estopped from ever asserting these claims.

Moreover, the Tenth Circuit improperly focused on the alleged adequacy of representation by the curator. It cited in support several cases in which the United States acted on behalf of Indian tribes to settle disputes. The difference between tribal representation, where the United States stands in the shoes of Native American tribes to adjudicate questions, and this case, in which the curator represents the impaired party alone, is distinct. The curator is not acting on behalf of the absent family members as the United States is for the tribe; no party is representing the rights of the absent family members in the federal action. It follows that according to the third factor, there will be prejudice to the absentees.

The fourth consideration is the interest of the public and the courts in ensuring complete, consistent, and efficient settlement of controversies. Surely the most efficient, consistent and complete resolution of a lawsuit where identical issues are pending in two different forums involves settling a dispute in one court system rather than two. This is particularly true when a suit is currently pending in a forum that can accommodate all parties. The hope of preventing such multiple trials in multiple forums regarding the same controversy is clearly the reason behind Rule 19's implementation. That purpose is frustrated by such repetitive suits, by which neither efficiency nor consistency is served.

All four factors in this instance suggest but one result: that the case should not proceed without the missing plaintiffs. Had the Tenth Circuit followed this Court's precedent and given meaningful review to the *Provident Bank* factors, it would have concluded that the district court's order of dismissal was not only proper, but well within its discretion.

The Court of Appeals was unpersuaded by arguments regarding impairment of interests, repetitive lawsuits, double damages, or society's interests. The court's analysis conceded that many courts view the existence of an alternative forum as dispositive, but concluded that was only justified when there was not another forum available. Accordingly, it decided that "Mr. Rishell, as plaintiff, has an interest recognized by federal law in the forum of his choice, which is not outweighed here by the interests of the absent parties, defendants, or the judicial system." *Rishell-II*, 94 F.3d at 1413 (App. 12).

However, the rule serves to equally protect the public and all parties, as indicated by the advisory committee notes to Rule 19.

> Clause (1) stresses the desirability of joining those persons in whose absence the Court would be obliged to grant partial or "hollow" rather than complete relief to the parties before the Court. **The interests that are being furthered here are not only those of the parties, but also that of the public in avoiding repeated lawsuits on the same essential subject matter.** Clause (2)(i) recognizes the importance of protecting against the practical prejudice to him which may arise through a disposition of the action in his absence. **Clause 2(ii) recognizes the need for considering whether a party may be left, after the adjudication, in a position where a person not joined can subject him to a double or otherwise inconsistent liability.**

Citations omitted, Notes to the Amended FED. R. CIV. P. 19. (Emphasis added).

The Tenth Circuit further finds that it is "sheer speculation" that multiple litigation will result in increased jury awards in two cases, despite the fact that Mrs. Lacey's curator and family have filed lawsuits simultaneously in both state and federal court. However, Tenth Circuit precedent provides that it is not required that there be any absolute certainty of prejudice to the defendants or the plaintiffs, only that there is an actual chance. *Francis Oil & Gas, Inc. v. Exxon Corporation*, 661 F.2d 873, 877 (10th Cir. 1981).

The chance that there will be prejudice to the defendants is increased by the fact that the Tenth Circuit's

reasoning, carried to its logical conclusion, would allow each and every potential plaintiff to bring a separate additional lawsuit for damages against the same defendants based on the same underlying injury, despite the presence of identical issues of liability and the familial relationship. Such a potential outcome is contrary to the purpose behind Rule 19.

IV. PURSUANT TO THE TENTH CIRUCIT'S RULING, THERE IS A SPLIT OF AUTHORITY AMONG THE CIRCUITS AS TO WHETHER A PURPORTED WAIVER OF A PARTY'S INTEREST MAKES THEM INDISPENSABLE

The Tenth Circuit contradicted Seventh Circuit jurisprudence when it accepted curator Max Rishell's averment that Mrs. Lacey's spouse and children would waive their rights if the federal court action proceeds. The Seventh Circuit has affirmed the decision of a district court that reached the opposite conclusion: that the purported willingness of family members to risk estoppel does not convert them into dispensable parties.

In *Gottlieb v. Vaicek*, 69 F.R.D. 672 (N.D. Ill.), *aff'd by table*, 544 F.2d 523 (7th Cir. 1976), two brothers, who purchased limited partnerships for their own account and as an agent of their mother, sued a general partner. The court found that the mother would be collaterally estopped from relitigating issues if she were not joined and that her willingness to risk estoppel did not make her any less indispensable; accordingly, the case was dismissed. The court also found that permitting the action to continue without the mother would force a defendant to

withstand multiple litigation. *Id.* at 678. Likewise here, the family's purported waiver does not make the family members any less indispensable; moreover, it sanctions multiple and repetitive litigation.

Such attenuated agreements to waive jurisdiction on the one hand, while prosecuting a state court action on the other, should not suffice. Mr. Rishell says that Mr. Lacey, a non-party to this suit, is willing to waive not only his rights, but the rights of his children, who are also non-parties, and who are over 18 years of age. While Mr. Lacey contends that he will waive the Lacey family members' rights to any claims, the claimants want to have it both ways.[10] That is, they are apparently unwilling to dismiss the state court suit in the event that this litigation is allowed to proceed. Instead, they want this lawsuit to continue without the family members, while maintaining the state court suit to which all are parties. Because the family members would not concede their right to pursue the state court action, the district court found that the Laceys failed to make an adequate waiver as provided in *Saratoga Development Corp. v. United States*, 777 F.Supp. 29, 33 (D.D.C. 1991) (party waived his right to pursue the matter in subsequent litigation, thus demonstrating that he did not feel prejudiced "and will not pursue an independent claim thereby prejudicing defendants").

In reaching the opposite conclusion, the Tenth Circuit determined that a requirement that the family members

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[10] No court has ever addressed whether any waiver by Mr. Lacey of the children's interests would be valid.

waive their right to pursue any action was "too mechanical" an application of the rule. The Court of Appeals' opinion discounts the probability that the interests of the absent parties will be impaired by this suit. However, the court concedes that in Oklahoma, the rights of a spouse and children are derivative. Because their interests are derivative, the family members may be collaterally estopped from separately asserting their rights in a later suit, because their potential claims are wholly dependent on those presented by Max Rishell. Max Rishell, in this suit, represents only the interests of Mrs. Lacey.

The Tenth Circuit cited *Moore's Federal Practice* in its opinion, but that same treatise states that "of course, where the absent party will be bound in a technical sense, either by res judicata or collateral estoppel, its interests will be impaired if it is not joined." *Moore's Federal Practice*, ¶19.07[2.-1] at 19-104, n.4 (2d Ed. 1995); *See, e.g., Acton Co., Inc. of Massachusetts v. Bachman Foods, Inc.*, 668 F.2d 76, 78 (1st Cir. 1982). Of course the Lacey's interests will be impaired if they are not joined.

It is acknowledged that plaintiffs are customarily entitled to their choice of forum. However, the right to choose the forum does not "trump" the purpose of Rule 19 to protect all concerned, both the parties before the court and those who are absent.

> It seems inappropriate under general principles of equity that plaintiffs should be permitted to pick and choose which necessary parties they will name for the purpose of conferring federal jurisdiction on this Court. If indispensability is a benefit which can be waived by the party for the

> purpose of securing diversity jurisdiction, federal courts would lose control over their jurisdictional boundaries. Equity and good conscience would seem to require that under circumstances such as those present here, parties should present their claims in a state court, rather than attempt to manipulate jurisdiction by dropping plaintiffs with a substantial interest in the claim solely for the purpose of retaining jurisdiction in federal court.

Potomac Electric, 54 F.R.D. at 492-493. Accordingly, Mr. Lacey's purported wish to waive his interests and those of his children (whose rights are not his to waive) should not override the Federal Rules of Civil Procedure regarding necessary and indispensable parties.

CONCLUSION

The Tenth Circuit's conclusions, which directly oppose those of other circuits, create a split among the Courts of Appeals on jurisdictional issues. The earlier Tenth Circuit decision in this case abrogates a long-held principle of law regarding the domicile of an incompetent, rendering the question of domicile complicated and subject to evidentiary contest. The second Tenth Circuit decision impacts the rights of children and spouses to be present as parties when their interests may be adjudicated. Moreover, if absentees can merely purport to waive their rights, Rule 19's protections are trivialized. Accordingly, Petitioners respectfully request that this Court

grant their Petition for Writ of Certiorari to address these issues regarding subject matter jurisdiction.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MAX LEE RISHELL, Curator of the person and estate of Kathleen Lacey, an incapacitated person,

Plaintiff-Appellant,

and

MARRIOTT CORPORATION, as Plan Fiduciary of the Marriott Corporation Multi-Med Health Plan,

Plaintiff-Intervenor,

v.

JANE PHILLIPS EPISCOPAL MEMORIAL MEDICAL CENTER; JANE PHILLIPS EPISCOPAL HOSPITAL, INC., formerly Jane G. Phillips Memorial Hospital, Inc., doing business as Oklahoma Medical Collection Services; CHARLES WELLSHEAR, M.D.,

Defendants-Appellees.

No. 95-5034

Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 94-C-636-B)

(Filed Aug. 26, 1996)

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Inona Jane Harness (Haven Tobias, with her on the briefs) of Pierce, Couch, Hendrickson, Baysinger & Green, Oklahoma City, Oklahoma, for Defendant-Appellee Charles Wellshear, M.D.

Stephen J. Rodolf (Barry L. Smith and Leslie C. Weeks, with him on the briefs) of Barkley & Rodolf, Tulsa, Oklahoma, for Defendant-Appellee Jane Phillips Episcopal Hospital.

Before **SEYMOUR**, Chief Judge, **PORFILIO**, and **TACHA**, Circuit Judges.

SEYMOUR, Chief Judge.

This case is before us a second time for review of a pretrial ruling. In the previous appeal, we reversed the district court's determination that diversity jurisdiction was lacking and remanded for further proceedings on the jurisdictional issue. *Rishell v. Jane Phillips Episcopal Memorial Medical Ctr.*, 12 F.3d 171 (10th Cir. 1993). On remand the district court overruled defendants' motion to dismiss for lack of diversity jurisdiction, but dismissed the action under Fed.R.Civ.P. 19 for failure to join indispensable parties. Plaintiff again appeals and we reverse.

I

Plaintiff Max Lee Rishell is the curator of the person and estate of Kathleen Lacey. Mrs. Lacey exists in a permanent vegetative state as a result of her failed attempt to commit suicide while she was hospitalized in defendant institution and under the care of defendant Dr. Charles Wellshear. Mr. Rishell brought this negligence action to recover damages resulting from Mrs. Lacey's injuries.

This case has already had a tortuous procedural history. It was originally filed in the Western District of Oklahoma. After that court dismissed for lack of diversity jurisdiction, Mr. Rishell filed this appeal and, together with Mrs. Lacey's husband and children, also filed an action in state court to prevent perceived statute-of-limitations problems. Defendants filed a motion with this court to dismiss the appeal, arguing for the first time that Mrs. Lacey's husband and children are indispensable parties whose joinder would destroy diversity jurisdiction. We summarily denied the motion and directed the parties to proceed with the oral argument scheduled some ten days later. After we reversed and remanded, defendants moved in district court to dismiss for failure to join indispensable parties. While this motion was pending, the court transferred the action to the Northern District of Oklahoma, which granted the motion.

In this appeal, Mr. Rishell contends that this court's order denying defendants' motion to dismiss for lack of indispensable parties constitutes the law of the case, and that the district court therefore had no authority to consider the merits of that issue. Mr. Rishell argues in the

alternative that Mrs. Lacey's husband and children are not indispensable parties and that the lower court abused its discretion in holding to the contrary. We conclude that the doctrine of the law of the case does not apply in the circumstances here. We further hold, however, that Mrs. Lacey's husband and children are not indispensable parties. Accordingly, we again reverse and remand for further proceedings.

II

We first address and reject Mr. Rishell's assertion that the district court was precluded by the law of the case from considering the indispensable party issue. As we have noted, defendants' motion filed in this court seeking dismissal for failure to join indispensable parties was summarily denied without discussion. "Law of the case principles do 'not bar a district court from acting unless an appellate decision has issued on the merits of the claim sought to be precluded.' " *Wilmer v. Board of County Comm'rs*, 69 F.3d 406, 409 (10th Cir. 1995) (quoting *United States v. Caterino*, 29 F.3d 1390, 1395 (9th Cir. 1994)).

Mr. Rishell correctly argues that law of the case applies to issues that are resolved implicitly as well as to those decided explicitly. We have articulated three circumstances in which an issue will be considered implicitly decided for purposes of the law of the case. *See Guidry v. Sheet Metal Workers Local No. 9*, 10 F.3d 700, 707 (10th Cir. 1993), *modified on other grounds*, 39 F.3d 1078 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1691 (1995). The doctrine applies when:

> (1) resolution of the issue was a necessary step in resolving the earlier appeal; (2) resolution of the issue would abrogate the prior decision and so must have been considered in the prior appeal; and (3) the issue is so closely related to the earlier appeal its resolution involves no additional consideration and so might have been resolved but unstated.

Id. The district court determined that our summary denial did not fall within any of these circumstances and that we therefore did not implicitly decide the indispensable party issue.[1]

Mr. Rishell does not argue that the district court applied these factors incorrectly. He contends instead that our summary denial implicitly decided the issue because it was presented in the motion we denied. Although we acknowledge that the three factors set out above are not exhaustive, *see id.* at 707 n.5, we nevertheless rejected an analogous argument in *Wilmer.* There the defendant argued that because a court must always satisfy itself of its jurisdiction, a decision on the merits is an implicit ruling that jurisdiction is present. We disagreed, holding that even though the jurisdictional issue had been recognized by the dissenting opinion, "such a theoretical consideration should not be confused with the implicit but *actual* determination necessary to invoke the law of the

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[1] In rejecting Mr. Rishell's argument on this issue, the district court pointed to the fact that defendants' motion was filed less than two weeks before oral argument was scheduled. The court concluded that this "eleventh hour" motion was not well received on the basis of timing rather than on the basis of substance.

case doctrine." *Wilmer*, 69 F.3d at 409 (emphasis in original). Here, as in *Wilmer*, the fact that a court of appeals should raise the issue of indispensable parties sua sponte does not in and of itself require the imputation of an implicit determination of the issue. We conclude that the district court was not barred from addressing the indispensable party issue on remand, and we therefore turn to the merits of that issue.

III

"We review a district court's decision as to whether a party is indispensable for an abuse of discretion." *Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1549 (10th Cir. 1993). In so doing, we "must consider 'whether the decision maker failed to consider a relevant factor, whether he [or she] relied on an improper factor, and whether the reasons given reasonably support the conclusion.' " *Kickapoo Tribe of Indians in Kansas v. Babbitt*, 43 F.3d 1491, 1497 (D.C. Cir. 1995) (quoting *Johnson v. United States*, 398 A.2d 354, 365 (D.C. 1979)) (alteration in original). The standards set out in Rule 19 for assessing whether an absent party is indispensable are to be applied "in a practical and pragmatic but equitable manner." *Francis Oil & Gas, Inc. v. Exxon Corp.*, 661 F.2d 873, 878 (10th Cir. 1981). *See also Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 106-07 (1968). "The moving party has the burden of persuasion in arguing for dismissal." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990).

Determining whether an absent party is indispensable requires a two-part analysis. *See id.; Francis Oil & Gas*, 661 F.2d at 877-78. The court must first determine

under Rule 19(a) whether the party is necessary to the suit and must therefore be joined if joinder is feasible. If the absent party is necessary but cannot be joined, the court must then determine under Rule 19(b) whether the party is indispensable. If so, the suit must be dismissed.

Whether Mrs. Lacey's husband and children are necessary parties under Rule 19(a) requires assessment of three factors. The court must consider (1) whether complete relief would be available to the parties already in the suit, (2) whether the absent party has an interest related to the suit which as a practical matter would be impaired, and (3) whether a party already in the suit would be subjected to a substantial risk of multiple or inconsistent obligations.[2] In ruling that the absent parties here are necessary, the district court concluded that a disposition in this action might impair or impede their

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[2] Rule 19(a) provides in pertinent part:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P 19(a). We consider parts 2(i) and 2(ii) separately in our analysis.

ability to protect their own interests. *See* Aplt. App. vol. III, at 594.[3]

We are not convinced that, as a practical matter, the interests of the absent parties will be impaired by this suit. It is true that under Oklahoma law the interest of the husband in recovering damages for loss of consortium arising from injuries to his wife is derivative of the wife's right to recover, and that the husband would therefore be barred in the state court action by an adverse determination here. *See Laws v. Fisher*, 513 P.2d 876 (Okla. 1973).[4] However, the prejudice to the relevant party's interest "may be minimized if the absent party is adequately represented in the suit." *Makah Indian Tribe*, 910 F.2d at 558. *See also Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 774-75 (D.C. Cir. 1986); *Heckman v. United States*, 224 U.S. 413, 444-45 (1912); 3A James Moore, *Moore's Federal Practice* ¶ 19.07[2.-1], at 19-106 (2d ed.

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[3] The district court relied on *Aguilar v. Los Angeles County*, 751 F.2d 1089 (9th Cir. 1985), and *Lopez v. Martin Luther King, Jr. Hosp.*, 97 F.R.D. 24 (C.D. Cal. 1983), in finding prejudice to the absent parties. To the extent that those cases are contrary to the authorities and analysis we have set out in the text on this issue, we do not find them persuasive. Indeed, the dissenting opinion in *Aguilar* is more convincing and in keeping with the weight of authority.

[4] The Oklahoma courts have consistently described a spouse's loss of consortium as a derivative interest. *See, e.g., Walker v. City of Moore*, 836 P.2d 1289, 1292 n.4 (Okla. 1992). Those courts have also held that children may maintain a cause of action for loss of parental consortium which contains many of the same elements that make up the spousal claim. *See Williams v. Hook*, 804 P.2d 1131, 1132 n.1 (Okla. 1990). Although the Oklahoma courts have not directly addressed the issue, we presume that the children's claim is derivative as well.

1995) ("the fact that the absent person may be bound by the judgment does not of itself require his joinder if his interests are fully represented by parties present").

Mr. Rishell, as Mrs. Lacey's curator, has an interest in establishing a right to recover for her injuries that is virtually identical to the interest of her husband and children in establishing their derivative claim. Indeed, Mr. Rishell presented an affidavit to the district court executed by Mr. Lacey in which Mr. Lacey acknowledges and agrees to the likely impairment of his interest and that of the children. The district court discounted the affidavit because Mr. Lacey had not signed a waiver agreeing to drop the state court claim, relying on *Saratoga Dev. Corp. v. United States*, 777 F. Supp. 29 (D.D.C. 1991). The court's reliance upon *Saratoga* was unwarranted in two regards. First, the court in that case did not *require* a waiver; the court merely observed that the execution of a waiver eliminated any possible prejudice. *Id.* at 34. Second and more significantly, in requiring a written waiver here the district court applied a mechanical approach rather than assessing the circumstances pragmatically. If, as a practical matter, the interests of the absent parties will be adequately represented, their interests will not be impaired and a waiver becomes a mere technicality.[5]

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[5] The district court did not directly address the affidavit in the context of assessing prejudice to defendants. As we discuss in reviewing the court's Rule 19(b) analysis, however, the court was clearly concerned with prejudice to the defendants arising from their need to defend two suits, and accordingly gave primary emphasis to the judicial economy of deciding all claims in one action. As we set out in text, this concern cannot be made dispositive under the circumstances here.

Consequently, we are not persuaded defendants carried their burden of persuasion on the necessary party issue.

Even assuming they did, however, we do not agree with the district court that the absent parties are indispensable under Rule 19(b). Determining whether an absent party is indispensable requires a court to consider:

> first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 19(b). The district court based its decision to dismiss primarily on the fourth factor, the availability of an alternative forum. In so doing, it misperceived the circumstances in which this factor may be viewed as dispositive.

Rule 19(b) analysis requires that the factors be evaluated in a practical and equitable manner, and be given the appropriate weight. As we have discussed above, prejudice to the absent parties is not a concern here because of the identity of interests between Mr. Rishell and those parties. Moreover, prejudice to defendants is minimized due to the likelihood that a verdict in their favor in this action would bar recovery by the absent parties in the state action, while a verdict against them would not itself

increase their exposure.[6] The first factor therefore weighs against dismissal. Because prejudice here is minimal, we need not be concerned with the second factor, which addresses the availability of means for lessening or avoiding prejudice. The third factor requires consideration of whether an adequate remedy can be awarded without the absent party. Mr. Rishell, should he prevail, would be able to recover damages on behalf of Mrs. Lacey for her injuries despite the lack of her husband and children as parties. The third factor therefore also counsels against dismissal.

We turn then to the fourth factor and assess whether the fact that Mr. Rishell may have an adequate remedy in state court requires dismissal of this action. The district court gave this factor dispositive weight, observing that some courts have viewed this consideration as the most important one of the four. Most courts have done so, however, only when an alternative forum is *not* available. "The availability of an alternative forum is primarily of negative significance under Rule 19. The absence of an alternative forum would weigh heavily, if not conclusively against dismissal while the existence of another forum would not have as significant an impact in favor of

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[6] We reject as sheer speculation and otherwise inappropriate defendants' argument that a state court jury would award damages to the husband and children separately in an amount greater than would be awarded in a single action. We likewise reject plaintiff's argument that a state court jury would be more sympathetic to defendants. *See Walsh v. Centeio*, 692 F.2d 1239, 1244 n.5 (9th Cir. 1982) (loss of the benefit of diversity jurisdiction will not alone prevent a dismissal under Rule 19(b)).

dismissal." *Pasco Int'l (London) Ltd. v. Stenograph Corp.*, 637 F.2d 496, 501 n.9 (7th Cir. 1980). Hence, courts " 'do not view the availability of an alternative remedy, standing alone, as a sufficient reason for deciding that the action should not proceed among the parties before the court.' " *Id.* at 501 (quoting *Bio-Analytical Servs., Inc. v. Edgewater Hosp., Inc.*, 565 F.2d 450, 453 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978)). "[T]he potential existence of another forum does not, in and of itself, outweigh a plaintiff's right to the forum of his or her choice. Some additional interest of either the absent party, the other properly joined parties or entities, or the judicial system must also be present." *Local 670, United Rubber Workers v. International Union, United Rubber Workers*, 822 F.2d 613, 622 (6th Cir. 1987), *cert. denied*, 484 U.S. 1019 (1988). *Accord Pasco*, 637 F.2d at 501. "[J]udicial economy and convenience do not in themselves provide grounds for dismissal." *Boone v. General Motors Acceptance Corp.*, 682 F.2d 552, 554 (5th Cir. 1982).

We agree with these courts. The district court should not have given dispositive weight to the availability of an alternative forum. Mr. Rishell, as plaintiff, has an interest recognized by federal law in the forum of his choice, which is not outweighed here by the interests of the absent parties, defendants, or the judicial system. Accordingly, we conclude the district court abused its discretion in dismissing Mr. Rishell's action under Rule 19.

We **REVERSE** the judgment of the district court and **REMAND** for further proceedings.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MAX LEE RISHELL, Curator of the person and estate of KATHLEEN LACEY, an incapacitated person, Plaintiff,	)	
and	)	Case No. 94-C-636-B
MARRIOTT CORPORATION, as Plan Fiduciary of the Marriott Corporation Multi-Med Health Plan, Intervening Plaintiff,	)	
vs.	)	
JANE PHILLIPS EPISCOPAL MEMORIAL MEDICAL CENTER; JANE PHILLIPS EPISCOPAL HOSPITAL, INC., formerly JANE G. PHILLIPS MEMORIAL HOSPITAL, INC., d/b/a OKLAHOMA MEDICAL COLLECTION SERVICES; and CHARLES WELLSHEAR, M.D., Defendants.	)	

ORDER

(Filed Sep. 14, 1994)

The Court has for decision the Defendants' Motions to Dismiss on the basis of subject matter jurisdiction for want of diversity and for failure to join indispensable parties under Fed.R.Civ.P. 19 (Docket #34 and #71).

Plaintiff, Max Lee Rishell, curator of the person and estate of Kathleen Lacey, an incapacitated person, filed this malpractice action on February 6, 1992, alleging Defendants were negligent in their medical care and treatment of Mrs. Lacey during her hospitalization in Bartlesville, Washington County, Oklahoma, for treatment of psychological illness (depression) in November 1990. On November 11, 1990, while a patient Mrs. Lacey attempted suicide by hanging in her hospital room, at which time she experienced an episode of anoxia producing irreversible permanently disabling mental and physical injury requiring around-the-clock care. The complaint herein seeks damages personal to Mrs. Lacey for past and future pain and suffering, permanent disability, medical expenses, loss of earnings, etc.; praying for in excess of $50,000.00. Diversity of citizenship is the basis for federal court jurisdiction as it is asserted that Mrs. Lacey at the time of the filing of this action was a citizen of Louisiana as she was domiciled there and that Defendants are residents of the Northern District of Oklahoma. The Intervening Plaintiff, Marriott Corporation, also diverse, as Plan Fiduciary of the Marriott Corporation Multi-Med Health Plan, seeks to protect its subrogated medical insurance interest.

The action was originally filed in the Western District of Oklahoma where the trial court dismissed it for want of diversity subject matter jurisdiction. The Tenth Circuit Court of Appeals reversed the dismissal by its opinion of December 21, 1993, and remanded the case for further

factual development and consideration on the issue of the presence of diversity of citizenship.[1]

During the pendency of the appeal, the Plaintiff herein, as well as Mrs. Lacey's husband, Ralph Lacey, and her children, Jeffrey Ralph Lacey, Benjamen J. Lacey and Katherine Lynn Lacey, commenced an action in the District Court of Tulsa County, State of Oklahoma, Case No. CJ-92-05427. In the Tulsa County, Oklahoma action, Plaintiff herein asserts the same cause of action as in the instant case and the husband and children of Mrs. Lacey seek damages for loss of services, contributions, companionship and grief arising from the said alleged negligence of the defendant hospital and physician in November 1990.

The Subject Matter Jurisdiction Issue

In its opinion the Tenth Circuit Court of Appeals directed the court to conduct a Fed.R.Civ.P. 12(d) hearing as follows:

> "The district court must permit a full development of all the facts before making a determination of jurisdiction. Most critical to the paradigm we have posed is the best interest of Ms. Lacey. Additionally, because the issue was not presented to us, the district court should determine whether her domicile was changed

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[1] In the Western District of Oklahoma there was also a motion to dismiss regarding venue urged by the Defendants which is now moot, the case having been transferred from the Western District of Oklahoma to the Northern District of Oklahoma which includes Washington County.

> by operation of the Louisiana code. Thereafter armed with all the facts, appropriate state law, and the principles we have articulated here, the district court will be able to make an informed determination of whether diversity exists."

The parties have agreed the record is complete and the diversity of citizenship subject matter jurisdiction question is at issue.

Concerning the issue of Mrs. Lacey's domicile being changed by operation of Louisiana law, the record reveals the dichotomy alluded to in the Court of Appeals opinion (n.5). The Louisiana Civil Code, art. 39 (West 1993), expressly provides that the interdict (Mrs. Lacey) has her domicile with her curator (Mr. Rishell). The curator is domiciled in Missouri.[2] Page 4 of the Court of Appeals opinion states that diversity as it affects federal jurisdiction is a matter of federal not state law. Thus, the controlling statute is 28 U.S.C. § 1332(c)(2) which provides that the legal representative (curator) of an incompetent shall be deemed to be a citizen of the same state as the incompetent. But, in any event, whether in Louisiana or Missouri, as hereafter discussed, diversity of citizenship with the Defendants is present.

The record is replete with pro and con arguments regarding the domiciliary issue. Suffice it to say, however, when all of the exhibits and facts are reviewed and analyzed, it appears clear that in February 1992, Mrs.

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[2] Mr. Rishell, Mrs. Lacey's brother-in-law, was selected as curator because of his relationship and the fact that he is a registered nurse with considerable mental health type nursing experience.

Lacey was domiciled in Slidell, Louisiana at the New Medico nursing facility for her own best interests. On a long-term basis this is where she could get the specialized and quality of care required on terms the available insurance and/or third-party payors, in conjunction with the health facility, would approve. (Deft. Ex. I to Jane Phillips Episcopal Hospital's Supplemental Brief in Support of Motion to Dismiss filed August 1, 1994). To this date Mrs. Lacey remains a resident of the New Medico facility in Slidell, Louisiana.

The determination of Mrs. Lacey's citizenship and domicile is to be made as of the date of filing of the complaint, i.e., February 19, 1992. *Bank One, Texas v. Montle*, 964 F.2d 48, 49 (1st Cir. 1992); *Safeco Ins. Co. of America v. Mirczak*, 662 F.Supp. 1155, 1158 (D.Nev. 1987); *Hakkila v. Consolidated Edison*, 745 F.Supp. 988, 989-90 (S.D. N.Y. 1990).

For the reasons stated above, Defendants' motion to dismiss for want of subject matter jurisdiction due to lack of diversity of citizenship is hereby OVERRULED.

The Indispensable Parties Issue

Defendants assert that the husband and children of Kathleen Lacey are indispensable party plaintiffs to this action. Since they are citizens of the same state as the Defendants, Oklahoma, this will destroy diversity of citizenship and deprive the court of subject matter jurisdiction. As pointed out above, Mrs. Lacey's husband and children are Plaintiffs in the Tulsa County, Oklahoma state action seeking damages for loss of spousal and

parental consortium resulting from the same alleged negligence which is the subject of the instant action. Mrs. Lacey's claim herein is joined with the other family members' claim in the Oklahoma state court action.

Fed.R.Civ.P. 19(a) and 19(b) provide as follows:

"(a) Persons to be Joined if Feasible.

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if. . . . (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. . . .

(b) Determination by Court Whenever Joinder Not Feasible.

If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened

> or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder."

Fed.R.Civ.P. 19 establishes the two-step analysis for determining who should be joined as parties in an action. The first step in subsection (a) provides for who should be joined if joinder is feasible. Under subsection 19(a)(2), a person should be joined if he claims an interest relating to the subject of the action and is so situated that disposition in his absence could impair that interest or subject the other parties to multiple or inconsistent liabilities. The second step of the Rule 19 analysis, set forth in subdivision (b), provides for whether the action should be dismissed or proceed without the party if joinder is not feasible.

The essence of Plaintiff's argument herein is that since the husband and children of Mrs. Lacey have separate and independent claims, they should be permitted to proceed separately and are not indispensable parties in the instant action.

Two cases that are helpful precedent in this analysis concerning indispensable parties are *Lopez v. Martin Luther King, Jr. Hospital*, 97 F.R.D. 24 (C.D. Cal. 1983), and *Aguilar v. Los Angeles County*, 751 F.2d 1089 (9th Cir. 1985).

In *Lopez*, the parents of their brain-injured at birth child seek pre-majority parental damages authorized by California statute in a medical malpractice action. The plaintiffs are both Mexican nationals so there is diversity of citizenship in the action against the Southern California hospital. The injured minor child seeks damages for

pain and suffering and her post-majority claim in an action in the Los Angeles, California state court in which her mother is plaintiff as guardian *ad litem*. The minor plaintiff's claim, if joined with the instant parents' action, would defeat diversity.

In *Aguilar*, the facts are essentially a transparency of *Lopez*. The noncitizen parents of a brain-injured minor brought a diversity federal court action for medical malpractice seeking their damages. Contemporaneously the minor plaintiff, through his mother guardian *ad litem*, filed a state court action for the minor's damages alleging medical malpractice. If the minor's action were joined with the parents' federal court action, it would defeat diversity.

In both *Lopez* and *Aguilar*, the court's Fed.R.Civ.P. 19(a) and (b) analysis resulted in dismissal of the federal court action for failure to join an indispensable party. This court thinks the well-reasoned opinions of *Lopez* and *Aguilar* serve as precedent herein. In *Aguilar*, 751 F.2d at 1093, the court said:

> "We affirm the district court's choice of the reasoning in *Lopez v. Martin Luther King, Jr. Hospital*, 97 F.R.D. 24 (C.D. Cal. 1983), rather than that in *Cortez v. County of Los Angeles*, 96 F.R.D. 427 (C.D. Cal. 1983). *Lopez* properly construed the Rule 19(a)(2) 'interest' requirement as not limited to a 'legal' interest, but one to 'be determined from a practical perspective, not through the adoption of strict legal definitions and technicalities.' *Lopez*, 97 F.R.D. 24, 29 (C.D. Cal. 1983). This reasoning is supported by ample authority. See *Provident Tradesmen's Bank & Trust Co. v. Patterson*, 390 U.S. 102, 110, 88 S.Ct. 733,

738, 19 L.Ed.2d 936 (1968); *Kaplan v. International Alliance of Theatrical & Stage Employees*, 525 F.2d 1354, 1361 (9th Cir. 1975); *Smith v. State Farm Fire & Casualty Co.*, 633 F.2d 401, 405 (5th Cir. 1980). The Aguilars' approach, which emphasizes the distinct legal causes of action asserted by parents and child, focuses on legal technicalities and runs contrary to the prevailing view that 'interest' under Rule 19 should be determined from a practical, and not technical, perspective."

In *Lopez*, 97 F.R.D. at 28-29, the court stated:

"To this end, Rule 19 matters should be governed by practical considerations. Indeed, the Rule was amended in 1966 in an attempt to forestall what was developing as a rigid, formalistic approach to compulsory joinder under the old version of the Rule. In one of the most widely cited opinions on Rule 19, the Supreme Court concluded that the current version of the Rule 'emphasizes pragmatic considerations . . . of proceeding or dismissing.' *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 116-117 n. 12, 88 S.Ct. 733, 741 n. 12, 19 L.Ed.2d 936 (1968). Citing the Committee Reports on the 1966 Amendments, the Court further noted that 'there has been undue preoccupation with abstract classifications of rights or obligations as against consideration of the particular consequences of proceeding with the action. . . . ' Id. at 116, n. 12, 88 S.Ct. 741-42, n. 12. Common sense and realistic appraisals should play the primary role in making Rule 19 determinations. See *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee*, 662 F.2d 534, 537 (9th Cir. 1981) (look to the practical effects of joinder

> or non-joinder rather than rigid formula); *Gentry v. Smith*, 487 F.2d 571, 579-580 (5th Cir. 1973) (pragmatic considerations include granting the maximum effective relief with the minimum expenditure of judicial energy)."

Lopez also points out on page 29 that Rule 19(a)(2) does not require the same legal interest; it merely requires "an interest relating to the subject of the action."

The parties in the instant action concede that collateral estoppel applies under Oklahoma law to bar the husband's and children's derivative action if an adverse liability judgment is entered herein. Thus, under Fed.R.Civ.P. 19(a)(2), a disposition in the present action may impair or impede the husband's and children's ability to protect their own interests.

Four factors are set out in Rule 19(b) to be considered when deciding whether to proceed or dismiss the action. Justice Harlan in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968), characterized these factors as follows: "(1) plaintiff's opportunity to proceed in an alternative forum; (2) defendant's desire to avoid multiple litigation or inconsistent judgments; (3) prejudice to the absentee; and (4) the interest of the courts and the public in complete, consistent and efficient settlement of controversies."

Some courts have indicated that the most important of the four factors in Rule 19(b) is the availability of an alternative forum. *Anrig v. Ringsby United*, 603 F.2d 1319, 1326 (9th Cir. 1979); *Gottlieb v. Vaicek*, 69 F.R.D. 672 (N.D.Ill. 1975), *aff'd*, 544 F.2d 523 (7th Cir. 1976); and

Potomac Electric Power Co. v. Babcock & Wilcox Co., 54 F.R.D. 486 (D.Md. 1972).

The Plaintiffs herein have an adequate state forum. The causes of action brought herein can be joined to the current action pending before the Tulsa County, Oklahoma district court, thereby enabling one court to dispose of the entire controversy.[3] Professor Moore has noted that "[w]hen the state court remedy is live, the district courts have been slow to deem it inadequate." 3A J. Moore, *Moore's Federal Practice* ¶ 19.07-2[4] (2d ed. 1982).

Two lawsuits have already been filed that derive from essentially the same set of facts and require consideration of the same legal issues relative to liability. The Defendants have a strong and legitimate interest in being involved in one action rather than two.

In *Lopez*, 97 F.R.D. at 33, the court stated:

> "Public policy dictates that in these times of crowded dockets and limited judicial resources, litigants should avoid, if possible, the maintenance of two identical lawsuits in separate forums. The policy interest in avoiding piecemeal litigation is especially strong where, as here, it is evident that the ongoing state court action can adjudicate the entire controversy. *See Evergreen Park Nursing & Convalescent Home, Inc., supra* at 1116. This does not mean that federal courts may absolve themselves from exercising jurisdiction with unbounded discretion in pursuit of 'judicial economy.' *See Colorado River*

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[3] The state court action has been stayed pending the rulings herein. It is not this court's place to rule on the appropriateness of the Tulsa County district court venue.

Water Conservation District v. United States, 424 U.S. 800, 817, 96 S.Ct. 1236, 1246, 47 L.Ed.2d 483 (1976). In this regard, the Court believes that the words of former Chief Justice Aldrich of the First Circuit are instructive:

> 'It is true that the effect of the dismissal of the action is to deny this plaintiff the benefits of diversity jurisdiction, and that it has sometimes been said that federal courts 'will strain hard' to support diversity jurisdiction in the application of Rule 19. [citations omitted] However, we are shown nothing in the case at bar to make us believe that this factor, if important, is as important as relegating the parties to a jurisdiction, the existence of which has not been denied, where full workable and reasonable relief may be granted. This has been the customary result in similar situations, whether the absent [party was] termed indispensable or otherwise.'

Stevens v. Loomis, 334 F.2d 775, 778 (1st Cir. 1964)."

Plaintiff argues that *Aguilar* is distinguishable from the instant action because the relative position of the parties is reversed. *Aguilar*, 751 F.2d at 1093 answers this argument by stating that if collateral estoppel applies, such is a distinction without a difference. Even the dissent in *Aguilar* accepts this premise but attempts to make the point that in *Aguilar* collateral estoppel is not a probability under existing California law. However, the majority concluded that collateral estoppel was applicable under California law. In the instant action, as stated above, the parties concede that collateral estoppel would

apply to defeat the husband's and children's derivative claims if an adverse liability judgment was entered herein.

In conclusion, for the reasons stated above, this action is dismissed, without prejudice to proceeding in a state court action, for want of indispensable parties plaintiff, the husband and children of Mrs. Lacey, who, if joined herein, would defeat diversity jurisdiction.

IT IS SO ORDERED this 14th day of September, 1994.

/s/ Thomas R. Brett
THOMAS R. BRETT
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MAX LEE RISHELL, Curator of the person and estate of KATHLEEN LACEY, an incapacitated person, Plaintiff,	)	
and	)	Case No. 94-C-636-B
MARRIOTT CORPORATION, as Plan Fiduciary of the Marriott Corporation Multi-Med Health Plan, Intervening Plaintiff,	)	
vs.	)	
JANE PHILLIPS EPISCOPAL MEMORIAL MEDICAL CENTER; JANE PHILLIPS EPISCOPAL HOSPITAL, INC., formerly JANE G. PHILLIPS MEMORIAL HOSPITAL, INC., d/b/a OKLAHOMA MEDICAL COLLECTION SERVICES; and CHARLES WELLSHEAR, M.D., Defendants.	)	

ORDER

(Filed Jan. 24, 1995)

The Court has for decision the Motions to Reconsider the September 14, 1994, Order of this Court dismissing this action for failure to join indispensable parties under Fed. R. Civ. P. 19(a), filed by the Plaintiff, Max Lee Rishell

(Rishell), and Intervening Plaintiff, Marriott Corporation (Marriott). (docket #'s 33 & 34).

Rishell advanced five theories in support of his motion. The first theory advanced the proposition that, because the Tenth Circuit Court of Appeals denied a Motion to Dismiss filed by the Defendants Jane Phillips Episcopal Memorial Medical Center and Jane Phillips Episcopal Hospital, Inc., formerly Jane G. Phillips Memorial Hospital, Inc., d/b/a Oklahoma Medical Collections Services (Hospital), based on the allegation of the failure to join non-diverse indispensable parties, such a denial is a ruling in this case and thereby invokes the "Law of the Case Doctrine."

Rishell argues that the proper interpretation of the Tenth Circuit Court denial was to conclude that the Tenth Circuit, by its denial of the motion to dismiss, in effect rejected the indispensable party argument. The Order of the Tenth Circuit did not state that it rejected the indispensable party issue and in fact did not state any reason for denying the motion, merely stating that the motion was denied (Plaintiff's Motion to Reconsider, Exhibit "B").

The time sequence of the motion to dismiss and the Tenth Circuit's rather immediate rejection out-of-hand is noteworthy. Rishell initiated the instant action on February 6, 1992. On June 15, 1992, the district court dismissed the action for want of diversity (this issue was not the indispensable parties/want of diversity issue). On August 26, 1992, Rishell's Motion to Reconsider was denied by the district court and an appeal, filed on September 25, 1992, ensued.

After the matter was lodged in the Tenth Circuit, Rishell filed a state court action[1] in the State of Oklahoma. Hospital was not served in the state court action until March 30, 1993. Hospital, after briefing was completed and oral argument was set for November 10, 1993 at 9:00 a.m. in the Tenth Circuit appeal, filed a Motion to Dismiss with the Tenth Circuit dated October 28, 1993, which motion included the following disclaimer:

> "This motion is not filed within fifteen days after the Notice of appeal for the reason that the matters which render the appeal moot did not come to the attention of Defendant Hospital until after the fifteen days had expired as hereinafter explained."

While this Court can only speculate as to the Tenth Circuit's rather preemptory dispatch of Hospital's Motion (denied no later than five days after filing same without seeking any response from Plaintiffs/Appellants), it is likely that Hospital's dalliance in waiting until the matter was fully briefed before the *appellate court* to file this motion on October 28, 1992, less than two weeks before oral arguments were to be heard, was not well received. Hospital could have filed a motion within fifteen days of service of the state court summons (March 30, 1993), thereby attempting good faith compliance with the fifteen day rule, since the plaintiffs had already initiated their state court action and the Hospital was then arguably

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[1] This action was brought by Rishell on behalf of the person and the estate of Kathleen Lacey, an incompetent person, by Ralph Lacey (husband of Mrs. Lacey) for himself and as next friends of Benjamin Jay Lacey and Katherine Lynn Lacey and by Jeffrey Ralph Lacey, children of Kathleen Lacey.

aware or constructively aware of the indispensable parties/want of diversity potential issue. This the Hospital did not do.

The Law of the Case Doctrine holds that when "an issue is once litigated and decided, that should be the end of the matter." *See United States v. U.S. Smelting, Refining, & Mining Co.*, 339 U.S. 186, 198, 70 S. Ct. 537, 544 (1950). This presupposes that the issue was actually litigated rather than an assumed inferential disposition.

As Rishell correctly states, *Guidry v. Sheet Metal Workers International Association, Local No. 9*, 10 F.3d 700 (10th Cir. 1993), presents a three point framework to analyze implicit decisions under the Law of the Case Doctrine. *Id.* at 707. The first point is to answer whether resolution of the issue was necessary to resolve the earlier appeal. *Id.* at 707. Herein it is not necessarily so, as the Tenth Circuit may have had procedural reasons for dismissing the Motion. The second point is to determine if resolution of the issue would abrogate the appeal. *Id.* at 707. This point also fails as a reading of the Tenth Circuit decision will show that its decision referred to the issue of Ms. Lacey's domicile and not the issue of indispensable parties. Thus, resolution of the indispensable parties issue by this Court does not abrogate the Tenth Circuit decision. The third point, whether the issue was so closely related to the appeal, also fails. *Id.* at 707. The question of Ms. Lacey's domicile is sufficiently removed from the issue of indispensable parties so that the latter was not necessarily implicitly decided.

The Court concludes Hospital's [sic] Law of the Case invocation is not well taken because the Tenth Circuit's

denial of Hospital's eleventh-hour motion to dismiss is decisive of no issue.

The second theory advanced by Rishell is that the September 14, 1994, Order dismissing this case could be considered a procedural bar, as a second dismissal, to the Plaintiff seeking relief. However, Rishell cites no authority specifying such a bar based on a second dismissal. Second dismissal under Fed. R. Civ. P. 41(a)(1) has been addressed by the federal courts.

> Rule 41(a)(1) provides in pertinent part that an action voluntarily dismissed by a plaintiff 'is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.' Under this 'two dismissal rule,' it is the *second* voluntary dismissal which is in essence with prejudice, and the *third* suit which is therefore barred. *Brown v. Hartshorne Public School District #1*, 926 F.2d 959, 961 (10th Cir. 1991) (emphasis in original).

> In pertinent part, Fed.R.Civ.P. 41 (a) (1) provides that an action voluntarily dismissed by a plaintiff 'is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when *filed by a plaintiff* who has once dismissed. . . . 'By its own clear terms the "two dismissal" rule applies only when the second dismissal is by notice under Rule 41(a)(2).' 9 Wright & Miller, *Federal Practice and Procedure* § 2368 at 188 (1971). . . . Therefore, the court rejects defendant's argument based on the 'two dismissal' rule. *Burnett v. Perry Manufacturing*,

> *Inc.*, 151 F.R.D. 398, 401-02 (D. Kan. 1993) (emphasis in original).

Therefore, since this dismissal by this Court is not a voluntary dismissal by Rishell, the two dismissal rule does not apply herein.

Further, in this Court's September 14, 1994, Order it is stated "this action is dismissed, without prejudice to proceeding in a state court action. . . . " Rishell has a *current* action and remedy before the state court; thus, his argument is without merit.

Rishell's third theory was the claim of no greater risk of prejudice to him and the children due to non-joinder. Rishell presented Mr. Lacey's affidavit acknowledging the likely impairment of his and the children's interests, apparently waiving their interests. (Plaintiff's Motion to Reconsider, Exhibit "C"). For a waiver under Fed. R. Civ. P. 19 to be valid, it must state: 1) the party waiving their rights would not feel prejudiced and 2) the party waiving their rights will not pursue an independent claim. *Saratoga Development Corp. v. United States*, 777 F. Supp. 29, 34 (1991). Even accepting that Mr. Lacey would not feel prejudiced, he still has another action pending on the same matter. Thus, he has not validly waived under Fed. R. Civ. P. 19.

Given the adequacy of the state forum for this matter and the judicial economy of adjudicating all of these similar interests in one forum, the Court finds Rishell's argument unpersuasive.

The fourth theory Rishell advances is that because one of the indispensable parties was no longer non-diverse, the matter should be reconsidered. The change of

domicile by one of the non-diverse parties does not alter the fact that there are still other non-diverse indispensable parties, which preclude jurisdiction. Further, as has been stated by the courts; "diversity jurisdiction is determined based upon the citizenship of a party at the time the case is filed." *Aetna Casualty & Surety Co. v. Hillman*, 796 F.2d 770, 776 (5th Cir. 1986). To accept Rishell's argument would be a rejection of settled law regarding diversity jurisdiction.

The final theory advanced by Rishell was the general allegation that the interests of all parties weigh against the dismissal of the case. Rishell presents no new considerations which this Court has not already considered in its deliberations. Nor does Rishell present any new authority which would sway this Court to alter its Order.

Intervening Plaintiff/Appellant, Marriott, also presented its Motion to Reconsider, offering the argument that it will not be able to intervene in the state action due to exclusivity of jurisdiction in accordance with 29 U.S.C. § 1132(e).[2] Marriott's argument is rejected by this Court for a number of reasons.

First, Marriott's claim assumes that intervention is Marriott's *only* recourse. This is not so. Since Marriott's claim is contingent upon the success of Rishell's claim, Marriott's intervention was not required in this matter. Marriott could have waited until Rishell's action is decided, and, if successful, file a separate cause of action in federal court. As stated in the Court's previous Order,

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[2] Employment Retirement Income Security Act (ERISA) 29 U.S.C. §§ 1001 et seq.

some courts have indicated that the most important of the four factors in Rule 19(b) is the availability of an alternative forum. *Anrig v. Ringsby United*, 603 F.2d 1319, 1326 (9th Cir. 1979); *Gottlieb v. Vaicek*, 69 F.R.D. 672 (N.D. Ill. 1975), *aff'd*, 544 F.2d 523 (7th Cir. 1976); and *Potomac Electric Power Co. v. Babcock & Wilcox Co.*, 54 F.R.D. 486 (D. Md. 1972). Applying this same rationale to Marriott's claim for inability to intervene in the state action, it has an alternative forum available in the federal court where its interests would be protected in the event that it could not intervene in state court.

Second, it was the intent of Congress when enacting ERISA to exempt ERISA from direct state regulation. *FMC Corp. v. Holliday*, 111 S. Ct. 403, 411 (1990). This claim by Rishell does not seek to apply state law in such a way as to regulate the ERISA plan. Rishell's claim is a negligence action against Hospital. Further, the Tenth Circuit has ruled that ERISA does not preempt claims which are only tangentially involved with a benefit plan. *Settles v. Golden Rule Insurance Co.*, 927 F.2d 505, 509 (10th Cir. 1991). Further, despite the broad language of preemption found in the statute, the Court has "recognized limits to ERISA's pre-emption clause." *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 483 (1990). It is this Court's opinion that, in this matter, Marriott's claim for subrogation and reimbursement are only tangentially related to Rishell's claim against Hospital. Since this was not an action brought by Marriott under the auspices of ERISA, and since Marriott's claim is contingent upon and only tangentially related to the primary claim, to allow Marriott to override defendant's right to a proper forum would amount to allowing the tail to wag the dog.

Support for this analysis is found with the Seventh Circuit. In a similar case, where an ERISA insurance organization intervened, the district court remanded the personal injury, subrogation, and reimbursement claims to the state court and kept ERISA claims subject to mandatory jurisdiction in the federal courts. *Shannon v. Shannon*, 965 F.2d 542, note 2 (7th Cir. 1992). Since this matter involves Rishell's tort claim and Hospital's [sic] claim for subrogation/reimbursement, and does not involve additional direct claims under ERISA, in the interests of judicial economy, this matter should be heard by one tribunal, the state court.

Finally, it must be recognized that when Marriott initially moved to intervene under Fed. R. Civ. P. 24, the motion was granted at the time when it appeared that the action would be tried in federal court. The circumstances have changed, from a federal forum to a state forum.

In conclusion, for the reasons stated above, the original Order is upheld and Plaintiffs' Motions for Reconsideration should be and the same are hereby DENIED.

IT IS SO ORDERED this 24th day of January, 1995.

/s/ Thomas R. Brett
THOMAS R. BRETT
UNITED STATES
DISTRICT JUDGE

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MAX LEE RISHELL, Curator of the person and estate of Kathleen Lacey, an incapacitated person, Plaintiff – Appellant vs. JANE PHILLIPS EPISCOPAL MEMORIAL MEDICAL CENTER; JANE PHILLIPS EPISCOPAL HOSPITAL, INC., doing business as Oklahoma Medical Correction Services, formerly known as Jane G. Phillips Memorial Hospital, Inc., Defendants – Appellees.	)	No. 92-6326

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. CIV-92-252-C)

(Filed Dec. 21, 1993)

Larry Alan Tawwater, Lampkin, McCaffrey & Tawwater, Oklahoma City, Oklahoma (Ben T. Lampkin and Jo L. Slama with him on the briefs), for Plaintiff-Appellant.

Karen L. Callahan, Barkley, Rodolf & McCarthy, Tulsa, Oklahoma (Stephen J. Rodolf and Ann Makela Schneider on the briefs) for Defendants-Appellees.

Before LOGAN and MOORE, Circuit Judges, and BROWN*, Senior District Judge.

MOORE, Circuit Judge.

This case was initiated by the personal representative of a person who, while hospitalized in the defendant institution, failed in an attempt to end her own life. As a consequence of injuries arising from her abortive suicide, the person, Ms. Lacey, now exists in a permanent vegetative state in an institution in Louisiana specially able to care for her. Imprisoned within her own body and deprived of mental capacity to make even the most insignificant decisions for herself, she appears trapped in an artificial time warp between Oklahoma, the state where she lived at the time of her injury, and Louisiana, her current and apparently permanent residence. Her appeal presents the question of whether the district court correctly determined because Ms. Lacey was incapable of forming an intent she is unable to change her domicile from Oklahoma to Louisiana, thus nullifying diversity jurisdiction in this case.[1] We think not, and reverse.

The operative facts are rather simple. After a period of treatment following her injury, Ms. Lacey was moved to a special facility in Louisiana which provides long-

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* Honorable Wesley E. Brown, Senior District Judge for the District of Kansas, sitting by designation.

[1] For diversity purposes, the domicile of a legal representative is that of the ward. 28 U.S.C. § 1332(c)(2).

term care for persons with brain injuries. Both parties agree Ms. Lacey's injury has left her mentally incapacitated, unable to make decisions of any kind, and her condition is presently regarded as irreversible. Prior to the filing of this action, an interdiction proceeding was filed in Ms. Lacey's behalf in Louisiana, and plaintiff, her brother-in-law, was appointed curator of Ms. Lacey's person and her estate.[2]

Plaintiff brought this action seeking damages for defendant's alleged negligence. Defendant moved to dismiss on the ground Ms. Lacey remains a domiciliary of Oklahoma; therefore, the parties are not diverse. Plaintiff asserted Ms. Lacey is a domiciliary of Louisiana because she is under the jurisdiction of the Louisiana court and because plaintiff, as curator, and Ms. Lacey's husband, as undercurator, intended Louisiana to be her permanent home. After consideration of the arguments, the district court agreed with defendant, holding Ms. Lacey could not have changed her domicile because of her inability to form intent.

Following entry of the order of dismissal, plaintiff turned to the court in Louisiana having jurisdiction over Ms. Lacey's interdiction. Apparently at plaintiff's request, that court entered an order stating, in part, Ms. Lacey was a domiciliary of Louisiana and had been for some time prior to the institution of the federal action.

Plaintiff then moved the district court for reconsideration, attaching a copy of the Louisiana court order,

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[2] An interdiction is a proceeding akin to guardianship or conservation.

and asked the district court to recognize the recitations in that document. Believing the plaintiff was attempting to "scurry about, obtaining orders from state courts in an attempt to establish federal jurisdiction," the court refused to give cognizance to the Louisiana order. This appeal followed.

The conundrum presented to us is whether a personal representative appointed under court jurisdiction to act as the decision maker for a person who has lost forever the ability to make even the most insignificant decisions for herself must be barred from determining the location of the ward's domicile. Put another way, the question becomes whether the incompetent person is capable of achieving a change of domicile through the aegis of her personal representative.

The problem thus posited, we must immediately recognize diversity, as it affects jurisdiction, is a matter of federal and not state law. *Kantor v. Wellesley Galleries, Ltd.*, 704 F.2d 1088, 1090 (9th Cir. 1983); *Stifel v. Hopkins*, 477 F.2d 1116, 1120 (6th Cir. 1973); *Ziady v. Curley*, 396 F.2d 873, 874 (4th Cir. 1968); *Wilson By and Through Wilson v. Kimble*, 573 F. Supp. 501, 503 (D. Colo. 1983). Thus, the ultimate determination in this case must be made under the guidance of federal principles. Even though federal principles will dictate the outcome, however, we can utilize state law as an aid to reaching the proper decision. *Rodriguez-Diaz v. Sierra-Martinez*, 853 F.2d 1027, 1030 (1st Cir. 1988); *Stifel*, 477 F.2d at 1120. That decision is a mixed question of law and fact reviewed under a clearly erroneous standard. *Crowley v. Glaze*, 710 F.2d 676, 678 (10th Cir. 1983).

The linchpin for the district court's judgment is *Coppedge v. Clinton*, 72 F.2d 531, 533 (10th Cir. 1934), a case in which we unequivocally held an incompetent person presumptively lacks the capacity to change domicile. Indeed, that is a principle so well grounded in federal common law that it may be regarded as an aphorism. Nonetheless, the rule is not immutable.

Looking behind the principle, one perceives two points. First, the presumption of inability to form an intent is rebuttable. *Id.* Second, the principle rests upon the notion the incompetent person's right to declare domicile must be suspended until reason returns to avoid legal consequences that may later harm the person's best interest. *See* 13B Charles A. Wright et al., *Federal Practice and Procedure* § 3616 (2d ed. 1984). As corollary to the general principle, we conclude when an incompetent person will never regain reason, preserving the person's right to determine domicile in the future is but a fiction.

State courts have proceeded according to this corollary. They have allowed legal representatives of incompetent persons to change the domiciles of their wards for diverse beneficial purposes, but usually only under court direction or because of a family relationship between the representative and the ward. *See Hayward v. Hayward*, 115 N.E. 966, 973 (Ind. App. 1917) (guardian may proceed only under court order to change an insane ward's domicile because change would alter distribution of ward's estate); *Gibbs v. Berger*, 399 N.Y.S.2d 304, 307 (App. Div. 1977) (conservator "who is a close and appropriate relative with natural instincts of acting in the best behalf of an incompetent" can change incompetent's domicile without court order if done in good faith and in the

incompetent's best interest); *In re Gray's Estate,* 250 P. 422, 423 (Okla. 1926) (guardian can move ward's residence out of state only with court's permission); *Estate of Freeman v. Department of Revenue,* 10 Or. Tax. 219, 223 (Or. T.C. 1989) (in Oregon, guardian can change adult ward's domicile directly by the court order or under court order explicitly authorizing guardian to change domicile).

Another state court held the domicile of an incompetent person changed by operation of law when her brother had moved her from New York to New Jersey to receive custodial care. *In re Estate of Gillmore,* 243 A.2d 263, 270 (N.J. Super. Ct. App. Div.), *cert. denied,* 244 A.2d 304 (N.J. 1968). The court found for practical purposes the incompetent person resided permanently in New Jersey; maintained no other residence; had severed ties with her former home; and came to New Jersey to spend the remainder of her life. These "unique" circumstances led the court to conclude a change in domicile had been effected. Moreover, the court held additionally, as her duly qualified personal representative acting in good faith, the brother had legal capacity to effect a change in her domicile. *Id. See also In re Kassler,* 19 N.Y.S.2d 266, 269 (Sup. Ct. 1940) (recognizing a change in domicile based on the principle a guardian of an incompetent person "acting in good faith" has the right to permanently change the ward's domicile to another jurisdiction unless the court having control over the ward objects). Unless an appointing court holds to the contrary, the guardian of an incompetent person will usually have the authority to shift the location of the incompetent's domicile if the change serves the ward's best interests. *Restatement (Second) of Conflict of Law § 23 cmt. f (1988).* Finally, to resolve

an objection to diversity jurisdiction, the District Court for the Southern District of New York has recognized the ability of a personal representative to change the domicile of an incompetent ward and denied dismissal. *Love v. Roosevelt Hospital*, No. 92 Civ. 4211 (JSM), 1993 WL 190345 (S.D.N.Y. June 2, 1993).

In each of these cases, faced with the question of the domicile of an incompetent person, the court acted to achieve the best interest of that person.[3] In each instance, state law governs whether the substituted intent of the ward is to be executed under the limited and controlled authority of a personal representative or by operation of law. Yet, the common principle is to permit another person to make a decision for the incompetent whose best interests are at stake.

If the best evidence available shows the incompetent likely will never be restored to reason, the law must allow another, vested with legal authority, to determine domicile for the best interests of that person. To prohibit such determinations is to leave the incompetent in a never-ending limbo where the presumption against changing domicile becomes more important than the interests of the person the presumption was designed to protect.

This case presents a situation ripe for consideration of that principle. Plaintiff alleges Ms. Lacey's present

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[3] Other courts have concluded the best interests of the incompetent required domicile to remain unchanged until the person was restored to reason. *See In re Webber's Will*, 64 N.Y.S.2d 281, 285 (Sup. Ct. 1946) (change of domicile affects so many civil and property rights that a personal representative of an incompetent should not be able to change domicile).

condition is permanent, which defendant apparently concedes. It is the expressed intent of both her husband and brother-in-law that Ms. Lacey's current hospitalization be permanent and that Ms. Lacey remain in Louisiana so she may obtain benefits from that state. Nothing in the record suggests Ms. Lacey will ever return to Oklahoma, nor has defendant produced any evidence implying Ms. Lacey was moved to Louisiana simply to create diversity of citizenship.

We believe, therefore, the district court plainly erred by acting too hastily in rejecting plaintiff's claim of changed domicile. Unfortunately, the court, apparently believing the *Coppedge* presumption is inflexible, gave no consideration to whether it could be rebutted in this case. Because Ms. Lacey likely will remain institutionalized for the rest of her life, consideration must be given to plaintiff's capacity to change her domicile for her own best interests. At this juncture, however, such a judgment is premature.

The district court must permit a full development of all the facts before making a determination of jurisdiction.[4] Most critical to the paradigm we have posed is the best interest of Ms. Lacey. Additionally, because the issue was not presented to us, the district court should determine whether her domicile was changed by operation of the Louisiana code.[5] Thereafter armed with all the facts,

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[4] In fairness to the district court, we must note counsel did not completely frame the issues in the first instance. Indeed, it has fallen upon us to sort out the factors which must govern here.

[5] A curious dichotomy exists because from the documents in our record it is not clear why the Louisiana court concluded Ms. Lacey is domiciled in Louisiana. Under Louisiana law, once

appropriate state law, and the principles we have articulated here, the district court will be able to make an informed determination of whether diversity exists. Accordingly, the judgment of the district court is REVERSED and the cause REMANDED for further proceedings.

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an interdiction has been commenced and a curator appointed for an adult interdict, the domicile of the interdict is effected by operation of law. *See* La. Civ. Code Ann. art. 39 (West 1993) ("[A] person of full age, under interdiction, has his domicile with his curator."). While the apparently automatic effect of this provision negates the district court's concern plaintiff was attempting to create federal jurisdiction when none existed, it poses a curiosity because plaintiff is a domiciliary of the State of Missouri. The curiosity exists because for the purpose of diversity "the legal representative of . . . an incompetent shall be deemed to be a citizen only of the same State as the . . . incompetent." 28 U.S.C. § 1332(c)(2). Therefore, a conflict arises over which is the correct state of domicile for the purpose of federal diversity jurisdiction. The conflict, however, is only academic here. Whether Ms. Lacey is a domiciliary of Missouri because that is her curator's domicile, or plaintiff is a domiciliary of Louisiana because that is the domicile of his ward, is insignificant because there is diversity in either case.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MAX LEE RISHELL, curator of the person and the estate of KATHLEEN LACEY, an incapacitated person,	)	
Plaintiff	)	
vs.	)	No. CIV-92-252-C
JANE PHILLIPS EPISCOPAL MEMORIAL MEDICAL CENTER, JANE PHILLIPS EPISCOPAL HOSPITAL, INC., f/k/a Jane G. Phillips Memorial Hospital, Inc. d/b/a Oklahoma Medical Collection Services,	)	
Defendants	)	

ORDER

(Filed Jun. 5, 1992)

Before the Court for consideration is defendants' motion to dismiss on the grounds of improper venue and lack of subject matter jurisdiction. For the reasons explained below, the motion will be granted.

There is no dispute that defendants are citizens of Oklahoma and plaintiff, Max Lee Rishell ("Rishell"), is a citizen of Missouri. An issue raised is whether Kathleen Lacey ("Lacey"), an incompetent, is a resident of Louisiana or Oklahoma. At the time of her injuries, Lacey was a resident of Oklahoma. Because Lacey now resides in Louisiana, receives benefits from the State of Louisiana, and it is the intent of her curator that Lacey permanently

reside in Louisiana, Rishell urges the Court to rule Lacey is a resident of Louisiana and that the parties are thus diverse.

For the purpose of establishing diversity, "the legal representative of an . . . incompetent shall be deemed to be a citizen only of the same state as the . . . incompetent." 28 U.S.C. §1332(c)(2). It has been held an incompetent cannot change domicile. *Foster v. Carlin*, 200 F.2d 943 (4th Cir. 1952). To change domicile, "two things are indispensable: First, residence in a new domicile, and second, the intention to remain there indefinitely." *Crowley v. Glaze*, 710 F.2d 676, 678 (10th Cir. 1983). Diversity jurisdiction statutes must be strictly construed and under the facts presented here the plaintiff has the burden of proof. *Id.* at 678. There is a presumption that an individual who has been adjudged an incompetent and placed under the care of a guardian lacks sufficient mental capacity to change his domicile. *Coppedge v. Clinton*, 72 F.2d 531, 533 (10th Cir. 1934). The extent to which an individual is impaired determines whether an incompetent may change his domicile. *Id.* at 533.

Plaintiff's evidence, taken as true, establishes the following. Kathleen Lacey has been mentally incapacitated since November 22, 1990. Following her injury she was hospitalized in Oklahoma until February 14, 1991. Thereafter she was cared for in Texas until June 7, 1991, when she was transferred to Louisiana (Affidavit of Ralph Lacey, ¶¶ 5 and 6). Ralph Lacey is the husband of Kathleen Lacey (Affidavit of Ralph Lacey, ¶ 1). On December 27, 1991, Max Rishell was appointed Kathleen Lacey's curator (Letters of Provisional Curatorship, Interdiction of Kathleen Lacey, No. 91-15246-2, Parrish of St.

Tammany, State of Louisiana). Ralph Lacey is the undercurator of Kathleen Lacey (Affidavit of Ralph Lacey, ¶ 2). It is Ralph Lacey's intent that Kathleen Lacey permanently remain domiciled in Louisiana (Affidavit of Ralph Lacey, ¶ 8). Ralph Lacey, and not Max Rishell, states it is Max Rishell's intention that Kathleen Lacey remain domiciled in Louisiana (Affidavit of Ralph Lacey, 9). The Court finds plaintiff's evidence, if accepted as true, can not support a finding that Kathleen Lacey formed the requisite intent to change her domicile and thus she remains a citizen of Oklahoma. It follows that Rishell, in the capacity of Kathleen Lacey's legal representative, is also a citizen of Oklahoma. 28 U.S.C. §1332(c)(2).

The Court also finds unpersuasive Rishell's argument that because jurisdiction is proper in another case pending in the Western District, this Court should exercise supplemental jurisdiction and proceed with this case. This case is not consolidated with *Lacey v. Marriott*, CIV-91-1848-R, but instead they are two separate cases. 28 U.S.C. §1367 does not permit supplemental jurisdiction premised on one action to carry over to another case. *See* 28 U.S.C. §1367. "In any civil *action* of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims *in the action* . . . " (emphasis added).

For the reasons stated above, this Court lacks jurisdiction to proceed, Accordingly, defendants' motion to dismiss is granted.

IT IS SO ORDERED this 5 day of June, 1992.

/s/ Robin J. Cauthron
ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET ON 6-5-92

IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

MAX LEE RISHELL, Curator, on behalf of the person and estate of KATHLEEN LACEY, an incapacitated person; RALPH LACEY; JEFFREY RALPH LACEY; BENJAMIN JAY LACEY, a minor by RALPH LACEY as his parent and next friend; and CATHERINE LYNN LACEY, a minor, by RALPH LACEY as her parent and next friend;	)	No. CJ 92 05427
Plaintiffs,	)	
vs.	)	
JANE PHILLIPS EPISCOPAL MEMORIAL MEDICAL CENTER; JANE PHILLIPS EPISCOPAL HOSPITAL, INC., formerly JANE G. PHILLIPS MEMORIAL HOSPITAL, INC., d/b/a OKLAHOMA MEDICAL CORRECTION [sic] SERVICES; and CHARLES WELLSHEAR, M.D.;	)	
Defendants.	)	

PETITION

(Filed Nov. 18, 1992)

Plaintiffs state:

1. That Max Lee Rishell has been duly appointed as the Curator of the person and estate of Kathleen Lacey, an

incapacitated person, and is authorized to initiate this action on her behalf.

2. That commencing on or about the 21st day of November, 1990, and continuing thereafter, the defendants herein negligently rendered medical treatment below acceptable medical standards to the plaintiff, Kathleen Lacey.

3. That commencing on or about the 21st day of November, 1990, and continuing thereafter, the defendants herein failed to inform the plaintiff of material risks involved in the course of treatment rendered to plaintiff Kathleen Lacey; that defendants failed to inform plaintiffs of alternative treatments, the reasonably foreseeable material risks of each alternative, and of the option of no treatment; that plaintiffs would have chosen the option of no treatment or a different course of treatment had the alternatives and material risks of each been made known; and that defendants' conduct resulted in the injuries to plaintiff as set forth in paragraphs 6-9, below.

4. That commencing on or about the 21st day of November, 1990, and continuing thereafter, the plaintiff sustained injuries as set forth in paragraphs 6-9, below, resulting from an act, omission or instrumentality which was under the exclusive control and management of the defendants; that the events causing plaintiff Kathleen Lacey's injuries were of a kind which ordinarily does [sic] not occur in the absence of negligence on the part of the defendants.

5. That commencing on or about the 21st day of November, 1990, and continuing thereafter Plaintiffs sustained injuries as set forth in paragraphs 6-9, below, as a

result of defendants' negligence in failing to provide an adequately managed, staffed, and safe environment for patients hospitalized at defendant Jane Phillips Episcopal Memorial Medical Center.

6. As a result of defendants' conduct, plaintiff Kathleen Lacey, sustained severe physical and neurological injuries. These injuries are permanent, painful and progressive. As a further result of defendants' conduct, plaintiff Kathleen Lacey, has incurred, and will continue to incur, medical expenses; has lost, and will continue to lose, earnings; has suffered extreme pain of mind and body; has been permanently disabled and disfigured; has suffered an impairment of earning capacity; and has been damaged in an aggregate amount in excess of $10,000.00.

7. Plaintiff Ralph Lacey, adopts and repleads the allegations stated in paragraphs 1 - 6, above, and further alleges that he is the spouse of Kathleen Lacey, and that as a further result of defendants' conduct, he has incurred and will continue to incur medical expenses; has suffered extreme pain of mind; has suffered grief, loss of love, services and the companionship of his wife, Kathleen Lacey, and has been damaged in an aggregate sum in excess of $10,000.00.

8. Plaintiffs, Jeffrey Ralph Lacey; Benjamin Jay Lacey, a minor, by Ralph Lacey as his parent and next friend; and Catherine Lynn Lacey, a minor by Ralph Lacey as her parent and next friend, adopt and replead paragraphs 1 through 6, above, and further allege that they are the surviving children of plaintiff, Kathleen Lacey, and that as a further result of defendants' conduct, they have each been damaged in an amount in excess of

$10,000.00, due to the loss of services, earnings, contributions, companionship and grief suffered as a result of their mother's injuries.

9. Defendants' care and treatment of Plaintiff Kathleen Lacey constitutes gross professional misconduct as well as a gross breach of the accepted standards of medical practice. Defendants' conduct evidences a willful, wanton and reckless disregard for the rights of the plaintiff Kathleen Lacey and plaintiffs are thus entitled to an award of punitive or exemplary damages in an amount in excess of $10,000.00 exclusive of costs and interest.

WHEREFORE, plaintiffs individually pray judgment against the defendants, and each of them, for compensatory damages in an amount in excess of $10,000.00, and for punitive damages in an amount in excess of $10,000.00, plus costs, interest and any other relief the Court deems equitable and just.

Respectfully submitted,

LAMPKIN McCAFFREY &
TAWWATER

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ATTORNEYS FOR PLAINTIFFS

ATTORNEYS' LIEN CLAIMED
JURY TRIAL DEMANDED

Supreme Court, U.S.
FILED
MAR 3 1997

No. 96-1216

In The

Supreme Court of the United States

October Term, 1996

JANE PHILLIPS EPISCOPAL MEMORIAL MEDICAL CENTER, JANE PHILLIPS EPISCOPAL HOSPITAL, INC., f/k/a Jane G. Phillips Memorial Hospital, Inc. d/b/a Oklahoma Medical Collection Services, and CHARLES WELLSHEAR, M.D.,

Petitioners,

v.

MAX LEE RISHELL, Curator of the Person and Estate of KATHLEEN LACEY, an incapacitated person,

Respondent.

On Petition For Writ Of Certiorari To the United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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LIST OF INTERESTED PARTIES

Since the filing of the petition, Petitioners Jane Phillips Episcopal Memorial Medical Center, Jane Phillips Episcopal Hospital, Inc., f/k/a Jane G. Phillips Memorial Hospital, Inc. d/b/a Oklahoma Medical Collection Services (Hospital Entities) have entered into a settlement with Respondent Max Rishell, Curator of the Person and Estate of Kathleen Lacey. As a part of the settlement, all claims against Hospital Entities are to be dismissed and Hospital Entities will withdraw from further participation in the petition. Counsel for Respondent is advised Petitioners' counsel of record, Stephen J. Rodolf, will submit to this Court documents confirming the settlement and the withdrawal of himself, his firm, Barkley & Rodolf, and his clients, Hospital Entities, from the petition as soon as the district court signs the order dismissing the claims against Hospital Entities.

The remaining parties to the petition are Charles Wellshear, M.D., sole remaining Petitioner, and Max Lee Rishell, Curator of the Person and Estate of Kathleen Lacey, Respondent.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent requests the Court deny the petition for writ of certiorari seeking review of two decisions of the United States Court of Appeals for the Tenth Circuit, *Rishell v. Jane Phillips Memorial Medical Center,* 12 F.3d 171 (10th Cir. 1993) (*Rishell I*), and *Rishell v. Jane Phillips Memorial Medical Center,* 94 F.3d 1407 (10th Cir. 1996) (*Rishell II*). Citations to the opinions will be to the opinions attached in the Appendix of the petition.

STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction over the part of the petition relating to *Rishell I* pursuant to 28 U.S.C. § 2101(c). This Court has discretionary jurisdiction to review *Rishell II* pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The petition seeks review of two decisions, *Rishell I* and *Rishell II,* which were separate decisions of the Tenth Circuit on two different issues. In *Rishell I,* the appeals court addressed the issue of diversity of citizenship. In *Rishell II,* the appeals court was asked to determine the appropriateness of the lower court's dismissal based on lack of indispensable parties pursuant to Rule 19, Federal Rules of Civil Procedure. The diversity issue was not revisited in *Rishell II.* What the petition does not make clear is that no petition for writ of certiorari was filed following the opinion in *Rishell I,* which was entered on

December 21, 1993. The petition also fails to make clear that Petitioner Wellshear, now the only petitioner, was not a party to the action at the time of the *Rishell I* opinion. The issues of timeliness and standing were known to Petitioners at the time the petition was filed, yet the petition ignores these jurisdictional issues entirely.

The petition seeks review of *Rishell II* on the basis of a supposed conflict in the circuits. As will be demonstrated below, there is no genuine conflict. The two circuit opinions relied on in the petition each applied the same rules and considerations to two different sets of facts. Moreover, the decision in *Rishell II* is consistent with previous decisions of this Court regarding the scope of Fed. R. Civ. 19.

The petition fails to demonstrate why this Court should grant the writ in this case.

A. Statement of the Facts.

On November 21, 1990, Kathleen Lacey was hospitalized in the psychiatric unit of Jane Phillips Episcopal Hospital (Hospital) in Bartlesville, Oklahoma for treatment of suicidal ideations and depression caused by schizophrenia. She was admitted by Dr. Charles Wellshear (Wellshear) who was in charge of her care.

On November 22, 1990, Mrs. Lacey attempted to hang herself in her hospital room. As a result, she suffered severe anoxic brain injury and presently exists in a permanent vegetative state.

After her injury, Mrs. Lacey remained hospitalized in Hospital until February 14, 1991, when she was transferred to a rehabilitation hospital in Dallas, Texas where she remained until June 7, 1991. She was then transferred to a permanent, long-term care facility in Slidell, Louisiana where she continues to reside. On December 27, 1991, Max Lee Rishell was appointed Curator of Mrs. Lacey.

B. Course of Proceedings and Disposition of the Case Below.

This action was originally filed February 6, 1992, in the United States District Court for the Western District of Oklahoma, against Hospital. Hospital responded with a Motion to Dismiss asserting lack of jurisdiction and improper venue. On June 5, 1992, the district court granted dismissal finding lack of jurisdiction. The Tenth Circuit opinion in *Rishell I*, dated December 21, 1993, reversed the trial court and remanded for further consideration of the jurisdiction issue. The date of entry of the Tenth Circuit opinion was December 21, 1993. No petition for writ of certiorari was filed within 90 days of that date. In fact, no petition for writ of certiorari regarding the decision in *Rishell I* was filed until the current petition, filed January 29, 1997.

Following remand, Wellshear was added as a party defendant and both Hospital and Wellshear filed motions for dismissal, asking the district court to: (1) dismiss for want of jurisdiction after reconsidering the facts in light of *Rishell I*; and (2) dismiss for lack of indispensable parties, pursuant to Fed. R. Civ. 19. In addition, the defendants asked the district court to transfer the case to

the Northern District of Oklahoma. Without ruling on the jurisdictional issues, the district court of the Western District transferred the case to the Northern District. Thereafter, on September 14, 1994, the district court for the Northern District entered an order finding: (1) Mrs. Lacey was domiciled in Louisiana thus finding diversity jurisdiction to exist; and (2) the case should be dismissed for want of indispensable parties.

Respondent appealed the district court's decision to dismiss for lack of indispensable parties. No cross-appeal of the court's finding of diversity jurisdiction was taken. Following the decision in *Rishell II*, Hospital and Wellshear sought rehearing and suggested an *en banc* rehearing. Both were denied on October 31, 1996.

Following the remand of the case back to the Northern District, the case was transferred by U.S. District Judge John R. Brett to U.S. District Judge Sven Holmes, who held a status hearing, established pertinent dates and set a trial date of May 19, 1997. Acting pursuant to the court's schedule, the parties completed discovery on February 3, 1997. On February 6, 1997, a mediation was held which resulted in a complete settlement of all claims against Hospital by Respondent and Mrs. Lacey's husband and children. No settlement was reached with Wellshear and that portion of the case remains set for trial on May 19, 1997.

At the status hearing, the court was advised a Motion for Stay had been filed the previous day based on representations the petition would be filed. The matter was briefed to the court. The parties continued to adhere to

the schedule established by court and no stay has been entered.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS NO JURISDICTION TO CONSIDER *RISHELL I.*

A petition for a writ of certiorari must be filed within 90 days of the entry of the judgment below. 28 U.S.C. § 2101(c). This 90-day limit is a congressional mandate which restricts this Court's "authority to extend the period for filing except as Congress permits." *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990). Even missing the filing period by only one day will deny this Court jurisdiction. *Deal v. Cincinnati Board of Education*, 402 U.S. 962 (1971). The 90-day period begins to run when the Court of Appeals enters its final judgment or decree, not with the date the district enters its judgment under mandate from the appellate court. *Boylan v. United States*, 257 U.S. 614 (1921), *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942).

At the time of the entry of *Rishell I*, Wellshear was not a party to the litigation and thus had no standing to appeal *Rishell I*. Hospital had standing to appeal, but did not do so timely. With the withdrawal of Hospital from the petition, there is no petitioner left with standing to seek review of *Rishell I*. Clearly, Wellshear lacks standing to challenge *Rishell I*.

Wellshear had standing to appeal the district court decision following remand that diversity jurisdiction existed, but he did not do so. Not only did Wellshear fail to take his own appeal of that decision, he failed to cross-appeal when Respondent appealed the Rule 19 dismissal entered in the same order.

The fact the writ was timely filed following denial of rehearing in *Rishell II* is of no benefit to Wellshear. The decision in *Rishell II* did not modify, clarify or any way affect the prior decision in *Rishell I*.

Finally, it should be noted that even if this Court had jurisdiction, the petition would not be certworthy. In *Long v. Sassar*, 91 F.3d 645 (4th Cir. 1996), the case cited in the petition as creating a conflict in the circuits, the Fourth Circuit felt bound to adhere to its previous decision in *Foster v. Carlin*, 200 F.2d 943 (4th Cir. 1952). The Tenth Circuit, however, found its own precedent, *Coppedge v. Clinton*, 72 F.2d 531 (10th Cir. 1934) to be less rigid. In *Rishell I*, the Tenth Circuit found the general rule an incompetent person presumptively lacks the capacity to change domicile is not immutable. (App. 39). This conclusion had been reached by other courts cited in *Rishell I* (App. 39-41). Moreover, the Third Circuit, in *Juvelis by Juvelis v. Snider*, 68 F.3d 648 (3rd Cir. 1995), cited *Rishell I* in concluding a profoundly retarded person could change domicile. In *Rishell I* the Tenth Circuit merely remanded the case for further consideration by the district court. After reviewing all the facts, the district court found diversity jurisdiction. That finding is unchallenged to this day.

II.

THERE IS NO GENUINE CONFLICT AMONG THE CIRCUITS WARRANTING THIS COURT'S REVIEW.

The petition asserts *Rishell II* is in conflict with *Aguilar v. Los Angeles County*, 751 F.2d 1089 (9th Cir. 1985). However, in each case, the respective courts applied the same provisions of Fed. R. Civ. 19 to different sets of facts and reached conclusions based on those facts. While the *Rishell II* opinion does find the dissent in *Aguilar* more persuasive and in keeping with the weight of authority (App. 8, n.3), the decision does not turn on that analysis. Instead, *Rishell II* found the district court's reliance for dismissal primarily on the fourth factor of Rule 19(b) (whether there will be an adequate remedy available if the action is dismissed) to be misplaced. *Rishell II* found the fourth factor should not have been perceived as dispositive. The court found the first and third factors (the extent a judgment rendered in the person's absence might be prejudicial to the person already a party, and whether a judgment rendered in the person's absence will be adequate) to be in Respondent's favor, and the second factor (extent prejudice can be lessened or avoided) to be of no real concern under the present facts. The court, relying on several cases, found the fourth factor insufficient alone to justify dismissal. The court noted Respondent has an interest recognized by federal law to be in the forum of his choice and that interest was not outweighed by the interests of "the absent parties, defendants, or the judicial system." (App. 12).

The court in *Rishell II* followed a previous Tenth Circuit opinion, *Francis Oil & Gas v. Exxon Corporation*,

661 F.2d 873 (10th Cir. 1981) in which the court said the four factors "are not to be applied in any mechanical way," concluding instead, "they be determined in a practical and pragmatic but equitable manner," citing *Schutten v. Shell Oil Co.*, 421 F.2d 869, 874 (5th Cir. 1970) and *Provident Tradesmens Bank and Trust Co. v. Patterson*, 390 U.S. 102 (1968). That is precisely what the Tenth Circuit did in *Rishell II*. No conflict exists.

Even if there were a conflict, for determining the certworthiness of a petition, a conflict alone will not necessarily warrant the granting of a writ. See, e.g. *Beaulieu v. United States*, 497 U.S. 1038 (1990), in which Justice White, dissenting from a denial of certiorari, noted that during the 1990 Term, he had dissented from denial of certiorari on 48 occasions because in his view there were conflicts among the circuits "sufficiently crystallized" to warrant certiorari. *Id.* at 1039. Despite these conflicts, this Court denied all 48 writ petitions.

Finally, the petition fails to demonstrate an "important matter" warranting review. Rule 10, Rules of the Supreme Court. As noted in *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74, this Court "does not sit to satisfy a scholarly interest" in an issue. Nor does it sit "for the benefit of the particular litigants." " 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic." The number of times the issue of Rule 19 dismissals has reached the Courts of Appeals is relatively rare. Even if there were a conflict among the circuits, it would not be beyond the academic or episodic. It would not qualify as an important matter warranting this Court's consideration.

III.

THE DECISION IN *RISHELL II* IS IN KEEPING WITH THIS COURT'S DECISION IN *PROVIDENT TRADESMENS*.

The petition suggests the decision in *Rishell II* is at odds with this Court's decision in *Provident Tradesmens Bank and Trust Co. v. Patterson*, 390 U.S. 102 (1968). In fact, *Rishell II* is entirely consistent with that decision. In *Provident Tradesmens*, this Court concluded the inflexible approach adopted by the Third Circuit in its Rule 19 analysis "exemplifies the kind of reasoning that the Rule was designed to avoid," *Id.* at 107, and reversed the circuit court's decision to dismiss. This court, focusing on the "equity and good conscience" test of Rule 19(b) "would doubtless have led to a contrary result below." *Id.* at 116. This Court likewise acknowledged different cases have varying factors which must be balanced. *Id.* at 119. The *Rishell II* court applied the "equity and good conscience" test and correctly concluded Respondent's action should not have been dismissed. That conclusion does not warrant review by this Court.

CONCLUSION

The petition is not certworthy. Its attempt to revisit *Rishell I* is untimely, leaving this Court with no jurisdiction to review it. Its assertion *Rishell II* creates a conflict among the circuits is incorrect, as is its claim *Rishell II* conflicts with *Provident Tradesmens*. The burden is on a petitioner to demonstrate why this Court should review a particular case. The present petition fails to meet that

burden. Respondent respectfully requests the petition be denied.

Respectfully submitted,

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